Nos. 201 and 202

In the Supreme Court of the United States

OCTOBER TERM, 1942

AMERICAN MEDICAL ASSOCIATION, PETITIONER

v.

UNITED STATES OF AMERICA

THE MEDICAL SOCIETY OF THE DISTRICT OF COLUMBIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	4
The indictment	5
American Medical Association	7
The Medical Society of the District of Columbia	11
Group Health Association, Inc	13
Formation of the conspiracy	14
Operation of the conspiracy	24
A. Boycott of Group Health and its staff by the petitioners and their members	24
B. Boycott of Group Health and its staff by the Washington hospitals	28
Summary of argument	39
Argument:	
I. The acts for which petitioners were convicted constitute a conspiracy in "restraint of trade" within the meaning of Section 3 of the Sherman Act	42
A. Petitioners' conspiracy to exclude a competitor from the market, by means of boycott, is a conspiracy in *restraint* of trade prohibited by Section 3	44
B. Petitioners' conspiracy to restrain Group Health in its business of providing medical care and hospitalization was in restraint of *trade* within the meaning of Section 3	51
II. Petitioners are not within any immunity conferred by Section 20 of the Clayton Act	65
Conclusion	74

CITATIONS

Cases:

Anderson v. *United States*, 171 U. S. 604 44

Apex Hosiery Co. v. *Leader*, 310 U. S. 469 ..... 39, 43, 49, 50, 60, 61, 64

Associated Press v. *National Labor Relations Board*, 301 U. S. 103 59

Atkyns v. *Kinnier*, 4 Ex. 776 62

497278—42——1

Cases—Continued. Page

Atlantic Cleaners & Dyers, Inc. v. *United States*, 286 U. S. 427 ..... 45, 57, 58, 64, 65
Binderup v. *Pathé Exchange, Inc.*, 263 U. S. 291 44
Columbia River Packers Ass'n, Inc. v. *Hinton*, 315 U. S. 143 ..... 41, 68, 69
Cook v. *Johnson*, 47 Conn. 175 62
Davis v. *Mason*, 5 T. R. 118 62
Duty on the Estate of the Incorporated Council of Law Reporting for England and Wales, In the Matter of the, 22 Q. B. 279 59
Dwight v. *Hamilton*, 113 Mass. 175 62
Eastern States Retail Lumber Dealers' Ass'n v. *United States*, 234 U. S. 600 ..... 44, 46
Fashion Originators' Guild, Inc. v. *Federal Trade Commission*, 312 U. S. 457 ..... 40, 44, 45, 46, 50
Federal Baseball Club v. *National League*, 259 U. S. 200 64
Federal Trade Commission v. *Raladam Co.*, 283 U. S. 643 64
Gilman v. *Dwight*, 79 Mass. 356 62
Gravely v. *Barnard*, L. R. 18 Eq. 518 62
Haldeman v. *Simonton*, 55 Iowa 144 62
Hayward v. *Young*, 2 Chitty 407 62
Hazen v. *National Rifle Ass'n*, 101 F. (2d) 432 59
Ku Klux Klan v. *Commonwealth*, 138 Va. 500 59
La Belle v. *Hennepin County Bar Ass'n*, 206 Minn. 290 59
Loewe v. *Lawlor*, 208 U. S. 274 45
Mandeville v. *Harman*, 42 N. J. Eq. 185 62
Md. & Va. Milk Producers Ass'n, Inc. v. *District of Columbia*, 119 F. (2d) 787, certiorari denied 314 U. S. 646 59
Memphis Chamber of Commerce v. *Memphis*, 144 Tenn. 291 59
Montague & Co. v. *Lowry*, 193 U. S. 38 ..... 44, 45
New Negro Alliance v. *Sanitary Grocery Co.*, 303 U. S. 552 70
Pacific Typesetting Co. v. *International Typographical Union*, 125 Wash. 273 59
Paramount Famous Lasky Corp. v. *United States*, 282 U. S. 30 44
Pratt v. *British Medical Ass'n*, [1919] 1 K. B. 244 63
The Schooner Nymph, 1 Summ. 516 65
Sears, Roebuck & Co. Employees' Savings, etc. v. *Commissioner*, 45 F. (2d) 506 59
Standard Oil Co. v. *United States*, 221 U. S. 1 ..... 58, 62
State v. *Ku Klux Klan*, 117 Kans. 564 59
Straus v. *American Publishers' Ass'n*, 231 U. S. 222 ..... 44, 45
Sugar Institute, Inc. v. *United States*, 297 U. S. 553 44
Swift & Co. v. *United States*, 196 U. S. 375 45
United States v. *Addyston Pipe & Steel Co.*, 85 Fed. 271, affirmed 175 U. S. 211 ..... 43, 61
United States v. *American Medical Ass'n*, 110 F. (2d) 703 ..... 63, 64
United States v. *Atkinson*, 297 U. S. 157 56

Cases—Continued. Page

United States v. *First National Pictures, Inc.*, 282 U. S. 44 44

United States v. *Hutcheson*, 312 U. S. 219 66, 71

United States v. *Union Pacific R. R. Co.*, 226 U. S. 61 57

Ware and De Freville, Ltd. v. *Motor Trade Ass'n*, [1921] 3 K. B. 40 63

Statutes:

Act of July 2, 1890, Sec. 3, c. 647, 26 Stat. 209, 15 U. S. C. Sec. 3 3

Act of October 15, 1914, Sec. 20, c. 323, 38 Stat. 738, 29 U. S. C. Sec. 52 3, 65

Act of June 13, 1933, c. 64, 48 Stat. 128, 12 U. S. C. Sec. 141, *et seq.* 13

Miscellaneous:

21 Cong. Rec. 3146 43

21 Cong. Rec. 3148 43

21 Cong. Rec. 3152 43

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OPINIONS BELOW

The opinion of the district court sustaining a demurrer to the indictment is reported in 28 F. Supp. 752 and the opinion of the Court of Appeals for the District of Columbia reversing the judg-

ment sustaining the demurrer is reported in 110 F. (2d) 703. The opinion of the court of appeals (R. 1886–1907) affirming the judgments of conviction entered against petitioners after jury trial is reported in 130 F. (2d) 233.

JURISDICTION

The judgments of the court of appeals were entered on June 15, 1942 (R. 1908–9). Petition for writs of certiorari was filed on July 3, 1942, and was granted on October 12, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and as modified by Rule XI of the Rules of Practice and Procedure in Criminal Cases.

QUESTIONS PRESENTED

This Court granted certiorari limited to the first three questions presented in the petition for writs of certiorari. Since the second question thus presented includes and comprehends the first, the questions presented may be stated as follows:

(1) Whether the indictment charged and the evidence proved a conspiracy in "restraint of trade" within the meaning of Section 3 of the Sherman Act.

(2) Whether the acts for which petitioners were convicted are given immunity by Section 20 of the Clayton Act.

STATUTES INVOLVED

Section 3 of the Act of July 2, 1890, c. 647, 26 Stat. 209, 15 U. S. C. Sec. 3, known as the Sherman Act, provides in part:

> Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal. * * *

Section 20 of the Act of October 15, 1914, c. 323, 38 Stat. 738, 29 U. S. C. Sec. 52, known as the Clayton Act, provides:

> No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such

property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

STATEMENT

The indictment in this case was returned in December 1938 (R. 1). The district court sustained

a demurrer to the indictment and, on appeal, the court of appeals reversed this judgment (R. 24–25, 27).[1] The two petitioners and 22 other defendants were then brought to trial (R. 29–30). Directed verdicts of acquittal were entered in favor of four of the defendants (R. 38), and at the close of the trial the jury convicted petitioner American Medical Association (sometimes referred to herein as AMA) and petitioner The Medical Society of the District of Columbia (sometimes referred to herein as the Society or as the District Society) and acquitted the remaining 18 individual defendants (R. 44–45).[2] The Court of Appeals affirmed the judgments of conviction (R. 1908–9).

THE INDICTMENT

The indictment under which petitioners were convicted charges a combination and conspiracy in restraint of trade in the District of Columbia, in violation of Section 3 of the Sherman Act. The facts set forth in the indictment may be summarized as follows:

Group Health Association, Inc., was incorporated in the District of Columbia in February 1937

[1] The Government, prior to hearing on its appeal, petitioned this Court for certiorari. Certiorari was denied. 308 U. S. 529. After decision by the court of appeals, the defendants filed a petition for writ of certiorari. Certiorari was again denied. 310 U. S. 644.

[2] The district court imposed a fine of $2,500 on AMA and a fine of $1,500 on the District Society (R. 54–55).

as a nonprofit cooperative association of employees of the Federal Government. This organization (hereinafter referred to as Group Health) provides medical care and hospitalization for its members and their dependents in return for monthly dues from the members. The medical care which it offers is furnished by a staff of doctors who are under the direction of a medical director and are compensated by salary. Group Health has a modern clinic and it defrays, within limits, expenses of hospitalization of members and their dependents (R. 14):

The defendants, during the years 1937 and 1938, have combined and conspired to restrain Group Health in its business of providing medical care and hospitalization, to restrain the doctors on its staff, as well as other doctors, in the pursuit of their callings, and to restrain Washington hospitals in the operation of their business (R. 14–15). The plan and purpose of the defendants were to prevent Group Health from procuring qualified doctors for its staff and to prevent it from obtaining hospital facilities for its members, and to prevent Group Health doctors from consulting with other doctors and from treating their patients in Washington hospitals (R. 16–18). To achieve these objectives, the District Society and AMA induced and coerced their members to boycott Group Health by refusing to serve on its staff or to consult with doctors on its staff, and induced and coerced all the hospitals in the District of Columbia not operated by the Government to boycott Group Health by denying

hospital privileges to doctors serving on its staff (R. 17–19).

By way of "background," the indictment alleges that AMA has long been opposed to the group practice of medicine on a risk-sharing, prepayment basis—the basis upon which Group Health provided medical care—and that this opposition has been principally for economic reasons and because AMA fears the competition which this kind of practice offers to its doctor members, who practice on the customary fee-for-service basis (R. 5, 7). It is further alleged that such group practice has developed in an effort to meet the problem created by the increasing cost of medical care and by the fact that persons of low income have not been able to obtain adequate care under the traditional methods of medical practice (R. 5–6).

AMERICAN MEDICAL ASSOCIATION

AMA, an Illinois corporation, is a federacy of "constituent" state and territorial medical associations (Gov. Ex. 1,[2] R. 1581). Its membership

[2] Exhibit 1 is a stipulation as to certain facts, to which are attached, among other things, the constitution and bylaws of AMA (R. 1535, 1581–98).

A large part of the evidence in this case consists of exhibits which were read to the jury and these exhibits appear in Volumes I and II of the record at the respective points in the trial proceedings at which they were read to the jury. Exhibits admitted in evidence but not read to the jury are included in Volume III.

In this brief, when referring to evidence introduced in the form of an exhibit, we shall, as a matter of conveh-

consists of the members of the constituent associations (R. 1583). A doctor, to be a member of AMA, must therefore be a member of a constituent association.[4]

AMA is the largest and most influential medical association in this country (R. 112). On April 1, 1938, AMA had 109,435 members out of a total of 169,628 doctors in the United States (R. 1536) and many of the doctors who were not members of AMA were not in active practice (R. 180).[5] It publishes a weekly journal called the Journal of the American Medical Association which has a circulation of over 100,000 (R. 1102–3).

The governing body of AMA is the House of Delegates, composed of delegates elected by the constituent associations (R. 1028, 1582). The House elects a board of trustees and also elects certain councils or bureaus which carry on a great deal of the important work of AMA (R. 113). Among these are the Judicial Council, the Council on Medical Education and Hospitals, and the Bureau of Medical Economics (R. 113, 1589).

AMA has adopted certain Principles of Medical Ethics which embody AMA's rules governing the

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ience, ordinarily limit the citation to the appropriate page or pages of the record, without citing the exhibit-number.

[4] County medical societies chartered by constituent associations are known as component societies and membership in a constituent association can ordinarily be obtained only through a component society (R. 1537, 1581).

[5] In each of the years 1936 and 1937 its gross income was over $1,500,000 (R. 114).

relationship between the doctor and his patients, the profession and the public.[6] Every constituent association, with one exception, has adopted these Principles and they are therefore binding upon practically every AMA member (R. 1073–4).

Article VI of Chapter III of the Principles deals with the subject of "Compensation." Under Section 2 of this article it is "unprofessional" for a physician to dispose of his services under conditions "which interfere with reasonable competition among the physicians of a community." Section 3, which defines "contract practice" as meaning an agreement to furnish medical services to a group of individuals on the basis of a fee schedule, or for a salary, states that while contract practice is not "per se" unethical, it becomes "unethical," *inter alia*, when there is "solicitation" of patients, when there is "underbidding" to secure the contract, when the compensation is "inadequate" to assure good medical service, when "there is interference with reasonable competition in a community," and when "the contract because of any of its provisions or practical results is contrary to sound public policy" (R. 860).[7]

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[6] The Principles were read in full to the jury (R. 851–863).

[7] The above rules are clearly not related to ethics in the true sense of that word but are primarily concerned with the competitive aspects of medical practice. The House of Delegates has itself recognized the economic implications of many of the Principles (Gov. Ex. 607, R. 1821, 1823, 1827). In addition, the indefiniteness of these rules gives to the Judicial Council, which passes upon controversies growing

The Council on Medical Education and Hospitals inspects and approves hospitals for interne training (R. 776–777). The standards formulated by the Council are known as "essentials" and hospitals are examined to see whether they conform to them (*ibid.*). To be on AMA's approved list is "extremely important to a hospital"; this enhances the hospital's prestige and enables it to obtain internes whom it otherwise ordinarily could not procure (R. 214).

One of the "essentials" established by AMA for approval of a hospital is that the staff be composed of "ethical" physicians (Def. Ex. 12, R. 777).* The power of AMA to exercise influence over the composition of the staffs of hospitals was implemented and increased by the "Mundt resolution," adopted by the House of Delegates in 1934, which expresses the "opinion" that physicians on the staffs of hospitals approved by AMA for interne training "should be limited to members in good

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out of alleged violations (R. 1530–1), wide latitude to apply the Principles. AMA has never defined what is meant by the phrase "contrary to sound public policy" and it took no action when a definition was requested (R. 866). The Judicial Council has ruled that it is a fundamental of medical ethics that "anything which in effect is opposed to the ultimate good of the people at large is against sound public policy and therefore unethical" (R. 1032).

* Petitioners did not print this exhibit but, by stipulation, either party may refer in brief or argument to any exhibit which was received in evidence (R. 1882). The requirement that staff members be "ethical" appears in Par. 1, Sec. 2, of Def. Ex. 12.

standing of their local county medical societies" (R. 250). It follows, therefore, that AMA may withhold approval of a hospital solely because some members of its staff are not, in AMA's opinion, "ethical" or because they are not members in good standing of their local medical society.

The Bureau of Medical Economics prepares for publication and distributes "data pertaining to the economics of the practice of medicine"; it also furnishes "critical and constructive information and opinions" on this subject (R. 120–121). The bureau has investigated and reported upon numerous plans involving contract or group practice and it has carried on extensive correspondence with members of AMA and others concerning such plans (R. 224–225). Articles written by the Bureau are published in the Journal of the American Medical Association in a section entitled "Organization Section" (R. 117).

THE MEDICAL SOCIETY OF THE DISTRICT OF COLUMBIA

The District Society is a constituent association of AMA and the Principles of Medical Ethics of AMA are, by the terms of its constitution, "binding upon" its members (R. 1547, 1557).[9] An Executive Committee exercises "general oversight" over the affairs of the Society (R. 1552); this committee passes upon any charge of unethi-

[9] The Society's constitution and by-laws are a part of Gov. Ex. 1 (R. 1536, 1546–64).

cal conduct preferred against a member and recommends disciplinary action to the Society (R. 1560).

Section 5 of Article IV, Chapter IX of the Society's constitution provides that no member shall be professionally associated with "any" organization or individual engaged in medical practice in the District of Columbia or within 10 miles thereof "which has not been approved by the Society" (R. 1559). Under an amendment adopted in March 1937 the Executive Committee is authorized and directed to prepare a list of "approved" organizations and individuals (R. 1129–30, 1560).

A Compensation, Contract and Industrial Medicine Committee (referred to herein as the CC&IM Committee) has the duty of investigating all charges of unethical conduct relating to "contract practice" brought against any member and the constitution requires every member, before entering into an agreement for rendering professional service, to submit a copy thereof to this committee "for approval" (R. 1553, 1558).[10]

A Hospital Committee of 11 members is required to investigate the "ethical relations" between hospitals in the District of Columbia and physicians, to recommend "a list of hospitals to be approved

[10] The Society's constitution declares that it is "unprofessional" for a physician to dispose of his services under conditions "which interfere with reasonable competition among the physicians" of the community and members are prohibited from entering into any contract, the terms of which are "in violation of" this principle (R. 1558).

by the Society," and to inform the Society of the names of members who are associated in any way with hospitals not on the "approved list" (R. 1554). The constitution provides that members shall not serve upon the medical staff of any hospital "which is not approved by the Society" (R. 1559).

GROUP HEALTH ASSOCIATION, INC.

In 1936 Raymond R. Zimmerman, director of personnel of Home Owners' Loan Corporation (referred to herein as HOLC) became interested in providing a medical service plan for its employees.[11] After studying the cost of the sick leave of employees and familiarizing himself with the operation of various plans for group medical care, he recommended the adoption of such a plan for HOLC employees (R. 149–151). The result was the incorporation of Group Health in February 1937.

When Group Health began operations by opening its clinic on November 1, 1937, it had approximately 900 members,[12] all HOLC employees, but later, after its membership had been thrown open to civil employees of other Government agencies,

[11] Home Owners' Loan Corporation is an independent instrumentality of the United States created to refinance home loans (R. 150). The Act of June 13, 1933, c. 64, 48 Stat. 128, 12 U. S. C. Sec. 1461, *et seq.*, authorized the Federal Home Loan Bank Board to create the Corporation, which was to be operated under the direction of the Board.

[12] 84% of these members earned less than $4,000 a year, 58% less than $2,000 a year (R. 153).

the number of members increased to about 2,600 (R. 153, 500). A board of trustees elected by the members manages the business affairs of Group Health and elects its officers, but selection of doctors for its staff is in the hands of a Medical Director and the board of trustees does not exercise any supervision over the professional relation between staff doctors and member patients (R. 1224, 1228, 1232–3). The doctors on its staff are compensated by salary and serve full time (R. 293). In return for monthly dues, the member and his dependents, if any, are entitled to obtain medical examinations and treatments, laboratory tests, X-ray examinations, surgical operations, confinement care, nursing and ambulance facilities, house calls, and hospitalization not in excess of 21 days for any one illness (R. 1242).

FORMATION OF THE CONSPIRACY

AMA had for many years pursued a policy of opposition to all plans involving group practice on a risk-sharing basis. The policy was established by its House of Delegates [13] and was actively enforced

[13] In 1933 the House of Delegates formally disapproved the recommendation, made by the majority of the Committee on the Costs of Medical Care, that medical care for low-income families should be provided on a prepayment basis through doctors engaged in group practice (R. 219, 221–222). In 1934 the House adopted a resolution condemning a report of the American College of Surgeons in which the College indorsed prepayment plans (R. 138–143, 147–149). At the same session AMA adopted certain principles to govern the conduct of medical service plans for families with limited

both by its Council on Medical Education and Hospitals (*infra*, pp. 29–30) and by the Judicial Council, which repeatedly affirmed the expulsion of doctors from AMA because of their participation in such plans (R. 253–257, 1031–2). In addition, AMA had, through numerous official communications, condemned and attacked such plans.[14] The same policy was fully applied in this case.

Much of the critical evidence of the conspiracy of which petitioners were convicted is found in minutes of meetings of the District Society and of its Executive Committee[15] during the period between June 1 and October 6, 1937. The minutes of these meetings and other contemporaneous documentary evidence establish that the purpose of the conspiracy was to protect the economic interests of the doctor members of the District Society (who *ipso facto* were members of AMA, R. 1537) by preventing Group Health and its doctors from competing with the Society members in rendering medical service.

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means, one principle being that any such plan must include "all legally qualified doctors of medicine in the locality covered by its operation" (R. 1086–7). Adoption of this restriction meant that no plan providing for medical care by a salaried staff could obtain the approval of AMA.

[14] R. 966, 968–977, 979–980, 983–984, 1032–3, 1035–8, 1042–3.

[15] These minutes appear in Gov. Exs. 36 and 37. The former covers minutes of the meetings of the Executive Committee on June 1, 1937, and June 21, 1937 (R. 276, 283). The latter covers the minutes of the Society and of all other meetings of the Executive Committee. The index to the record (Index viii–ix) shows the pages of the record where the minutes of each meeting appear.

A special meeting of the Society's Executive Committee was called on June 1, 1937, to discuss the reported plan to provide medical care for HOLC employees (R. 276).[16] The chairman stated that plans of this kind "threaten the coming generation of physicians and their income" and a member pointed out that the medical profession had two "weapons" at hand, one, "to forbid consultation with the physicians doing this type of work," and the other, "to withhold approval of any hospital that would take any cases or assist in the movement in any way" (R. 277). Similar views were expressed at another special meeting on June 21 when a subcommittee, appointed to study the matter, made its report (R. 283–284, 320).[17]

[16] A few days earlier, a District Society member had written Woodward, director of AMA's Bureau of Legal Medicine and Legislation (R. 1538), that since the questions raised by the Group Health plan were of national interest, the AMA should take the initiative and Woodward should come to Washington to advise as to the "best methods of approach" (R. 889–890). Woodward then called upon Zimmerman, the sponsor of the Group Health plan (R. 890–891), told Zimmerman that as an AMA representative, he was "particularly disturbed" by Group Health's articles of incorporation, and predicted that after the plan was "given a going over" at the annual AMA meeting, this "would be the end of it" (R. 152, 891).

[17] The chairman of this meeting asserted that one of his sons had just completed his medical course and that another was just entering medical school and that this represented "a tremendous personal investment, the usefulness of which would be greatly curtailed by" the adoption of any plan such as that proposed by Group Health (R. 284). Another committee member said that two ways were available in "com-

The Executive Committee met again on June 24, 1937, and authorized the appointment of a new subcommittee to ascertain all of the facts concerning the Group Health plan (R. 290, 314). The report of this subcommittee, presented at a meeting of the Executive Committee on July 12, 1937 (R. 319–320), stated in part (R. 321):

> The present HOLC corporation is only a minor consideration: (a) Either innumerable others will follow or (b) a large all-embracing organization will succeed all smaller enterprises. The first eventuality is not of great concern to us. Competition will kill them and since they cannot be large enough to supply a proper quality of medical care or hospitalization on their own account subscribers will gradually withdraw. Also the Medical Society by its present control over its members, and through them of the hospitals can adequately fight (if it is so desired) these small units. * * *

The report stated that if an organization to cover all Government employees should be formed it would be assured of adequate financial support and would be able to secure qualified personnel (*ibid.*). The report then continued (R. 321–322):

> The Medical Society must therefore adopt a definite policy toward the cooperative

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batting or controlling any such scheme" as that proposed, "(1) through disciplining our own members who undertook to participate, and (2) the possibility of doing something to recalcitrant hospitals through pressure on their staffs" (*ibid.*).

movement as a whole, and at once, without wasting a great deal of time on the HOLC project. The alternatives of policy are primarily:

1. Approval of cooperatives as at present outlined.

2. A laissez-faire attitude of seeing what will happen.

3. Disapproval and active combat with all measures at our command.

4. Disapproval of all other plans and the offer of prepaid medicine through the Medical Society (a) either as a Society subsidiary or (b) through a change in the Medical-Dental Service Bureau.

The first of these, approval, is manifestly an impossibility. The second alternative threatens through inertia more than any other factor.

Active opposition is possible at present. Whether it is advisable is another matter, unless some substitute plan can be suggested. Failure to place the cooperative on the approved list of the Medical Society would automatically forbid any consultations by members of our Society. Any full-time employees of the corporation could probably easily fail to be put on the courtesy list of the hospitals for one reason or another without the fact of his connection with a cooperative being even mentioned. In fact any combative method would necessarily have to be camouflaged to the nth degree.

The report recommended that the Society form its own organization "for the distribution of prepaid medical care as a distinct unit *competitive* with any other organization that may be formed" (italics supplied) (R. 322).

Meanwhile, the AMA maintained an active interest in the matter. In June 1937, Woodward, director of its Bureau of Legal Medicine and Legislation (R. 1538), rejected a suggestion made by a Society member to West, AMA secretary and general manager (*ibid*), that the Society might "attempt to go along with this outfit [Group Health] if it is possible to do so and retain our faces" (R. 315, 316); Woodward stated that such an attempt at cooperation would violate AMA's Principles of Medical Ethics (R. 317). He promptly reported the matter to AMA's board of trustees, which authorized West and Fishbein, the Journal editor (R. 1538), "to proceed to inform the profession of the country as to the efforts of the HOLC to enter into the practice of medicine." The board also authorized Woodward and Leland, director of the Bureau of Medical Economics (R. 1538), to go to Washington "to try to advise the Medical Society of the District of Columbia if that Society is willing to accept advice" (R. 316–317).[18]

[18] Woodward, West, and Leland thereafter conferred on numerous occasions with Society representatives in Washington (R. 327, 337, 345–346, 891–893, 963, 1029–30). Woodward and Leland participated in Society meetings concerning Group Health (R. 903, 908, 963–964) and at their own request were kept fully informed of all local action and developments (R. 318–319, 326, 342, 352–354, 359, 922).

On July 26, 1937, the special subcommittee appointed by the District Society to deal with the Group Health problem (*supra*, p. 17) met with the Board of Trustees of Group Health and certain of its officers.[19] The subcommittee warned Group Health that unless it was "approved" by the Society all members of the Society would be prohibited from accepting employment with Group Health or consulting with doctors on its staff (R. 178–180). The suggestion was made that Group Health "convert itself into a financial organization" so that medical care would be provided, not through salaried doctors, but through such members of the Society as might agree to serve Group Health subscribers on some fixed fee schedule (R. 181, 185).[20]

A special meeting of the members of the Society was held on July 29 for the purpose of arriving at some conclusion concerning the action to be taken with reference to Group Health (R. 347–348). At this meeting, as the secretary of the Society

[19] The discussion at this meeting was transcribed by HOLC employees (R. 156) and the transcript was introduced in evidence as Gov. Ex. 10 (R. 176–197).

[20] A member of the subcommittee stressed the competitive threat implicit in the Group Health plan if it should obtain maximum enrollment. After noting that there are about 180,000 Government employees in the District of Columbia, he said (R. 191): "Multiply that by 3.3, you see what it would do here as an economic thing. * * * It would simply result in the necessary exodus of a large part of the medical profession of the District of Columbia * * *."

reported to AMA, "various opinions were expressed by individual members ranging from the taking of most drastic measures in the way of boycott, etc., to various conciliatory propositions" (italics supplied) (R. 354). The meeting approved the appointment of a new subcommittee to make a report on the matter to the Executive Committee (R. 351).

The subcommittee reported to the Executive Committee on September 8, 1937 (R. 357). Its report, which the Executive Committee "accepted," consisted of three conclusions—(1) that Group Health is "unethical" and that participation therein by any Society member would render him "subject to disciplinary action by the Society," (2) that at this time it had no definite recommendation to make for "combatting" the activities of Group Health "other than is embodied by implication" in the first conclusion; and (3) that the Society "should maintain close contact" with AMA "in an effort to formulate a suitable and effective policy with respect to combatting the activity of the Group Health Association" (R. 357–358).[21]

[21] A member of the Executive Committee, advocating more definitely aggressive action, said that he looked upon Group Health as an organization "coming in and interfering with his business": that he expected to be in practice for some 20 years and did not propose, if it could be avoided, to have an organization of this kind "interfere with his work and income," adding, "Just what are you fellows going to do about it?" (R. 358.)

Thereafter, in the October 2 issue of the AMA Journal, an article prepared by Woodward [22] pursuant to the directions of AMA's board of trustees to inform "the medical profession of the country as to efforts of the Home Owners' Loan Corporation to enter into the practice of medicine" (*supra*, p. 19) denounced the Group Health plan. The article embodied suggestions to the District Society of a course of action which might successfully cripple and perhaps destroy Group Health (R. 384, 385):

> As the members of the salaried staff of the association are likely to be looked on by the profession generally in the community as on the outer verge of ethical practice, if not altogether beyond the pale, it is not clear how they are to obtain qualified consultants or procure hospital service for their patients.
>
> * * * * *
>
> In any event, medical service under the association would be likely to be handicapped by difficulty likely to be experienced in obtaining the best consultant service and hospital accommodations. Physicians who sell their services to an organization like Group Health Association for resale to patients are certain to lose professional status.

[22] The article, which was introduced in evidence as Gov. Ex. 293 (R. 368–386), was prepared at the request of AMA's board of trustees (R. 316, 367). It was written by the director of its Bureau of Legal Medicine and Legislation and was extensively revised prior to publication by the editor of the Journal (R. 893–894).

The article also stressed the economic dangers to the local profession presented by Group Health. It pointed out that Group Health could potentially reach and withdraw from private practice three-fourths of the population of the District of Columbia and that even if half this number were withdrawn, this would "materially disturb" medical practice in the District (R. 385).

At a meeting of members on October 6, three days after publication of this article, the Society adopted (R. 387–390) the following resolution (R. 388–389):

> Whereas, The Bureau of Legal Medicine and Legislation of the American Medical Association has prepared and published a comprehensive report on the activities of Group Health Association, Incorporated; and
>
> Whereas, The Medical Society of the District of Columbia is in full accord with the content of said report, both as to the established facts set forth therein and the implications drawn therefrom; therefore, be it
>
> Resolved, That the Medical Society of the District of Columbia cause a copy of said report to be sent to each of its members as an indication of its future policies with respect to combatting the activities of said Group Health Association and also with respect to the ethical responsibilities of the Medical Society of the District of Columbia and of its individual members.

OPERATION OF THE CONSPIRACY

A. *Boycott of Group Health and its Staff by the Petitioners and Their Members*

At a special meeting of the Society's Executive Committee on July 12, 1937, it adopted, pursuant to Chapter IX, Article IV, Sec. 5, of its constitution, a list of "approved" organizations and individuals practicing medicine in the District of Columbia (R. 327, 332–334). Group Health was not included in the list.

The evidence establishes that the omission of Group Health from this "white list" was for the express purpose of bringing into play against it the provision of the same section of the constitution (R. 331) that "no member of the Society shall engage in any professional capacity whatsoever with any organization * * * which has not been approved by the Society." At the meeting at which this white list was adopted the subcommittee reported that the failure to put Group Health on the approved list "would automatically forbid any consultations by members of our Society" (R. 322).[2] In response to a member's inquiry as to the medical personnel of Group Health it was stated that Group Health "would have to be ap-

[2] When the list was submitted to the committee one paragraph included as "approved" all the medical personnel "connected with" the Federal Government (R. 332–333). Group Health might be said to be connected with the Federal Government and the Committee accordingly substituted the words "employed by" for the words "connected with" (*ibid.*).

proved as a single unit" (R. 333). When the list was sent by registered mail to every Society member, as directed by the Executive Committee, the letter of transmittal not only quoted the constitutional provision prohibiting members from having professional relations with any organization not approved by the Society (R. 334), but enclosed a second letter which, with direct reference to Group Health (R. 1197), said (R. 341):

> It may have come to your attention that there is an organization or organizations that are interested in gaining medical personnel. Your attention is called to Chapter IX, Article IV, Section 5 of the constitution, quoted in full.

The Society's exclusion of Group Health from its approved list operated, without further action by the Society, to prevent its members from joining Group Health's staff and from consulting with doctors on its staff. The District Society's failure to approve Group Health not only prevented it from obtaining members of the Society for its staff (R. 151–152), but also prevented it from obtaining other AMA members for its staff (R. 237, 1357–8).[24]

[24] The Journal article denouncing Group Health and suggesting that "it is likely to be handicapped by difficulty experienced in obtaining 'consultant service' and hospital accommodations" (*supra*, p. 22) was written by AMA representatives with full knowledge that the Society had issued the white list excluding Group Health and that the subcommittee had reported that no Society member could retain his AMA or Society membership if he participated in Group Health (R. 892, 922).

The Society and AMA undertook to enforce the boycott resulting from its white list. Group Health, prior to the opening of its clinic on November 1, 1937, had persuaded two members of the District Society, Drs. Lee and Scandiffio, to become members of its staff (R. 652, 1442). On October 29, AMA notified the Society that these two doctors were members "in good standing" of the Society (R. 410). Although both doctors, late in October, submitted resignations as members of the Society (R. 453), the Society on November 2 summoned them to appear before its CC&IM Committee (R. 453–454). When they failed to appear this committee charged them with violating the Society's constitution by having relations with an organization not on the approved list and by failing to submit a copy of their agreement with Group Health to the CC&IM Committee for approval (R. 455–456).[28]

On the second day of the hearing before the Executive Committee, to which the charges were referred, Dr. Lee was notified that the proceeding against him would be dropped if he would promptly submit to the Society a copy of his resignation from Group Health (R. 558, 653–654). Dr. Lee complied and the proceeding against him was

[28] At a conference in Chicago on November 6, AMA's representatives were informed of the expulsion proceedings instituted against the two doctors, and were kept advised of the subsequent course of the proceeding (R. 563–564, 900).

dropped (R. 460–461). The proceeding against Dr. Scandiffio continued and resulted in his expulsion from the Society on March 16, 1938, for alleged violation of Chapter IX, Article III, Secs. 1 and 2, and of Chapter IX, Article IV, Sec. 5, of the constitution (R. 558–563).

Another Society member, Dr. Richardson, who was employed by Group Health to make house calls, resigned from its staff in July 1938 because of fear of losing hospital privileges (R. 630–631, 717).

The Society also rigidly enforced the prohibition against consultation with Group Health doctors. After one of the Society members had, solely for this reason, refused two requests for consultation, one in the case of a patient suffering from acute heart trouble and another in the case of an elderly lady who was so ill that the Group Health doctor thought she might die in the office (R. 951–954), the president of Group Health reported the matter to the president of the District Society (R. 544–545). The latter replied that he had personally advised the doctor in question that the Society's constitution prohibited consultation with any Group Health doctor and that it was his duty to advise that, under the constitution, consultation with "the hired agents" of Group Health is forbidden (R. 545–547).

When it was discovered that a Society member, Dr. Trible, had permitted a Group Health doctor to be present at an operation performed by Dr.

Trible on a child of a Group Health member and had later written the medical director of Group Health in response to a request from him for information concerning the case, the CC&IM Committee found Dr. Trible "guilty" of violating the provision of the constitution prohibiting professional relations with any organization not approved by the Society (R. 666–669, 670–671, 678). The Executive Committee, after receiving Dr. Trible's assurance that he would not in the future "in any way knowingly violate the ethics of the profession or the Constitution" of the Society, dropped the charges (R. 680) but sent him a letter warning him not to repeat his actions (R. 672).[28]

B. *Boycott of Group Health and Its Staff by the Washington Hospitals*

For doctors in general, access to hospital facilities is "valuable and important"; for the surgeon, it is "essential." The privilege of treating his patients in a hospital is obtained in one of two ways, by being a member of the hospital's "regular staff" or by being a member of its "courtesy staff." While the business and financial affairs

[28] In May 1938 the Society adopted a motion "that the Medical Society of the District of Columbia go on record as forbidding its members to receive monies or checks for services rendered to beneficiaries of Group Health Association, Inc., from or over the signature of Group Health Association, Inc., or its agencies and so notify the membership of the Medical Society" (R. 611–612).

of most hospitals are under the control of a lay board, its medical affairs are in the hands of a group of doctors known as the regular or attending staff. This staff determines the professional policies of the hospital and is responsible for the treatment of charity patients. Since the available positions on the regular staff are limited, the bulk of the profession obtains the privilege of treating its patients in a hospital by being included in the so-called courtesy staff. The doctors on the regular staff determine appointment to the courtesy staff. (R. 211–213.)

Both AMA and the Society proceeded to bring pressure to bear upon the Washington hospitals to exclude Group Health doctors. AMA's action took the form of forcing the hospitals to comply with the Mundt resolution of 1934, providing that hospitals approved for interne training should be limited in their staffs only to doctors who are AMA members.[27] In June 1937, the Council on

[27] AMA had similarly on other occasions followed the practice of invoking the Mundt resolution to compel hospitals to exclude doctors connected with medical service plans of which AMA disapproved. In 1938, immediately after the Judicial Council had affirmed the expulsion of certain Milwaukee doctors from the Milwaukee Medical Society because they were engaged in a group-practice prepayment plan, Cutter, secretary of the Council on Medical Education and Hospitals (R. 1538), advised the Milwaukee hospitals that the Mundt resolution required them to limit their staffs to members of the Milwaukee Society and that they were therefore obliged to withdraw privileges from the group

Medical Education and Hospitals conducted, for the first time since the adoption of the Mundt resolution in 1934, an inspection of Washington hospitals (R. 784–785). Following this inspection, Cutter, secretary of the Council on Medical Education and Hospitals (R. 1538), addressed letters to five of the local hospitals enclosing a copy of the applicable inspection report. The letters, after calling attention to the Mundt resolution, asked "What possibility, if any, exists for the observance of this recommendation?" (R. 265–266, 268, 270, 272–275). When he failed to hear from one of the hospitals he sent a second letter inquiring whether any action had been taken to enforce the resolution and he was then informed that it would be enforced except as to the teaching staff in its psychiatric department (R. 273–274). Another hospital, similarly pressed for a reply, responded that all except one member of its staff were members of the District Society and that the Mundt resolution "meets with the approval of the Medical Board as respects future appointments" (R. 275–276).

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practice doctors (R. 253–258, 814–821, 829–831). When two hospitals hesitated to do this, Cutter secured their compliance by notifying them that approval of the hospitals for interne training would be withdrawn unless they conformed with the requirement of the Mundt resolution (R. 258, 803, 821–823, 832).

The Council on Medical Education and Hospitals withdrew its approval from a hospital in Little Rock, Arkansas, and from a hospital in Tampa, Florida, because they permitted doctors engaged in prepayment plans to remain on their staffs (R. 247–249, 848–849, 863–864).

The Society implemented the AMA action in respect of hospitals. The white list adopted on July 12, 1937 (*supra*, p. 24), was sent to the various Washington hospitals.[*] After the Society had decided to model its policy on the "facts" and "implications" of the Journal article of October 3, 1937, in which it had been stated that Group Health was likely to experience difficulty in obtaining hospital accommodations (*supra*, p. 22), a division of opinion arose in the District Society as to the most effective way to induce a boycott of Group Health by Washington hospitals.

One group favored sending a letter to the hospitals informing them of the particular sections of the constitution relating to approval of hospitals and warning them that "if they failed to cooperate in every way that they might not be on the approved list" (R. 402). A letter giving effect to this proposal was drafted and approved by the Executive Committee (*ibid.*). But when the proposed letter was submitted to the Society membership on November 3, 1937, one of the members pointed out that this was not a wise way to accomplish the Society's objective because it "carried a veiled threat to the effect that if the hospitals did not comply the Society would unstaff them" (R. 424). He urged that the Society's Hospital Committee (one or more of whose members were on the regular

[*] Gov. Exs. 494 (R. 608); 500 (R. 599); 514, 515 (R. 621); 527 (R. 1797); 528 (R. 661); 615, 616 (R. 727).

staff of each Washington hospital) would be a more suitable medium to handle the matter and he proposed the following resolution, which the Society then adopted (R. 422-423):

> Whereas, The Medical Society of the District of Columbia has an apparent means of hindering the successful operation of Group Health Association, Inc., if it can prevent patients of physicians in its employ being received in the local private hospitals; and
>
> Whereas, The Medical Society of the District of Columbia has no direct control over the policies of such hospitals as determined by their lay boards of directors, except through its control of its own members serving on their medical staffs; and
>
> Whereas, Conflicts between the Medical Society of the District of Columbia and any local hospitals arising from an attempt to enforce the provisions of Chapter IX, Article IV, Section 5, of its Constitution should be assiduously avoided, if possible, because of the unfavorable publicity that would accrue to its own members; therefore, be it
>
> Resolved, That the Hospital Committee be, and is hereby, directed to give careful study and consideration to all phases of this subject and report back to the Society, at the earliest practicable date, its recommendations as to the best way of bringing this question to the attention of the medical boards and boards of directors of the various local hospitals in such a manner as to insure

the maximum amount of practical accomplishment with the minimum amount of friction and conflict.

The Hospital Committee complied with this resolution by presenting a report to a meeting of the Society held eight days later recommending that the Society adopt a resolution that the hospitals permit Group Health patients to be treated only by the doctors on their respective staffs and that a copy of the resolution be sent to the various local hospitals (R. 441, 449). The recommendation was deemed unsatisfactory in that it gave no assurance that Group Health doctors "might not become members of the staffs of the local hospitals" and it was therefore recommitted to the Hospital Committee (R. 449–450).

At a meeting on December 1, 1937, the Society adopted a new resolution proposed by the Hospital Committee. This resolution set forth that the Society "strongly recommends" that all hospitals follow the recommendation of AMA [29] "regarding the constitution of their entire Medical Staffs, namely, that each appointee be a member of" the District Society or of the local medical society where he was resident and a member of AMA (R. 459). The Society also adopted a motion to transmit a copy of this resolution to each local hospital (*ibid.*).

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[29] The recommendation referred to was that embodied in the Mundt resolution (*supra*, pp. 10–11).

This resolution, if complied with, would bring about the desired boycott of Group Health by Washington hospitals. Since Group Health doctors were barred from membership in the District Society (the only medical society open to doctors residing in the District of Columbia), if the hospitals limited their staffs to such membership, Group Health doctors would automatically be excluded from Washington hospitals.

The District Society had effective means for inducing or coercing compliance with its recommendation. Its constitution prohibited its members from serving on the staff of any hospital not approved by the Society (*supra*, p. 13). Since nearly all of the doctors on the staffs of the local hospitals were members of the Society,[20] the Hospital Committee could unstaff any local hospital by the expedient of eliminating it from the approved list.

At a meeting of the Society on February 2, 1938, a motion that the proper agency of the Society be instructed to present at its next meeting "the facts relating to the present status of Group Health physicians at the various Washington Hospitals preliminary to appropriate disciplinary action, in event any hospital has ignored the Medical Soci-

[20] For a roster of the Society membership, see Gov. Ex. 33 (R. 1629–49) and for a roster of the staffs of the local hospitals, see Gov. Exs. 451–A (R. 1876–81); 477 (R. 1741–59); 504 (R. 1775–1776); 513 (R. 1778–9); 519 (R. 1785–89); 525 (R. 1791–97); 603 (R. 1819–20); 613, 613–A (R. 1829, 1831–41); see also Index, Vol. 3, p. iii.

ety's wishes in the premises," was referred to the Executive Committee, and on February 21, 1938, was referred by that committee to the Hospital Committee (R. 475, 477). Pursuant to this motion, the Chairman of the Hospital Committee requested each of its members to inquire of the hospital which he represented whether it had taken any action on applications of doctors connected with Group Health and whether it had "recently revised" its staff list (R. 244–245, 549). The chairman also sent to each hospital a questionnaire requesting information concerning its correspondence with Group Health, the names of Group Health doctors having staff privileges, whether it is "in sympathy with" the policies of the District Society, whether it requires Society membership as a qualification for staff appointment, and the percentage of its staff holding membership in the Society (R. 244, 595–596).

The report based on responses to this questionnaire was submitted to the Executive Committee on March 28, 1938, and was adopted by the Society at a meeting on April 6, 1938 (R. 556, 565–567). The report, after stating that the by-laws of all but three of the local hospitals provide that no doctor may practice in the hospital unless he is a member of his local medical society, states further (R. 557–558):

> All of the local private hospitals are cooperating fully with the Medical Society in

respect to Group Health Association, Inc. At the present time only one of the local hospitals has on its staff list the name of a physician connected with Group Health Association, Inc. This hospital does not revise its staff list annually, as do the other hospitals, but it has assured the Chairman of the Hospital Committee that steps have been taken to deny this physician hospital privileges.

By reason of these various acts of the District Society or by reason of action taken by AMA (*supra*, pp. 29–30), the local hospitals (with one or two possible exceptions) limited their staffs to AMA or Society members. In the fall of 1937 or the first half of 1938, five hospitals (Children's, Columbia, Georgetown, Homeopathic, Providence) formally adopted such a rule,[39] and two others, Garfield and Sibley, gave assurances to the District Society that they would carry out the policy expressed in its December 1 resolution (R. 600, 608, 609). Casualty Hospital advised the Society in February 1938 that it had no applications from Group Health doctors and that it had undertaken to revise its list of staff doctors (R. 553). Emergency Hospital's rule, adopted in 1936, limited its staff to members of the Society but it had not actively enforced the rule until, after receiving the Society's inquiries, it ordered that its courtesy list

[39] Gov. Exs. 228 (R. 275–276); 238 (R. 269); 241 (R. 271–272); 318 (R. 551–552); 440–A (R. 621); 454–A (R. 575); 501 (R. 603–604); 522 (R. 685–686).

be checked and that doctors not members of AMA "be notified that they must join the Medical Society, or the hospital will be obliged to revoke their privileges" (R. 587, 591–592).

Despite repeated applications in the period from November 1937 to December 1938, all of the local hospitals excluded all of the Group Health doctors because of their connection with that organization. Since it was essential for the Group Health surgeon, Dr. Selders, to have hospital privileges, the efforts by Group Health to obtain hospital privileges for its staff centered around him. All of the local hospitals either failed to act upon his request for hospital privileges [32] or denied it.[33] Similar treatment was accorded the applications of all other Group Health doctors.[34]

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[32] Children's (R. 500–508, 684–685); Columbia (R. 484–488, 508–510, 618–621); George Washington (R. 520–522); Episcopal (R. 518–520).

[33] Casualty (R. 522–525); Emergency (R. 512–518); Garfield (R. 492, 495–496, 534–536, 600–602, 1162); Georgetown (R. 488–490, 536–537, 622–623); Homeopathic (R. 166–167, 538–539); Providence (R. 482–484, 540, 604–605); Sibley (R. 526–532, 1318–9).

[34] When Dr. Lee, having joined Group Health's staff, submitted his resignation to the Society, Emergency withdrew his staff privileges and restored them only when it was assured that he was still a member of the Society (R. 586–587).

Dr. Hulburt had been granted privileges in Georgetown in 1935 (R. 625). After he joined the staff of Group Health Association, he was told by the superintendent of Georgetown that he no longer had hospital privileges (R. 627–628). Within a month after Dr. Hulburt resigned from Group Health Association, he was formally granted courtesy priv-

One instance of treatment of a Group Health member by a Group Health doctor in a Washington hospital provoked prompt counter-action. Garfield Hospital, pursuant to its usual practice with respect to applicants, granted Dr. Selders temporary privileges pending action upon his application (R. 658–659). A Group Health member injured in an automobile accident was taken by ambulance to Emergency Hospital and, after it had refused to allow her to be treated by Dr. Selders, she was transferred to Garfield and treated there by Dr. Selders (R. 656–657). The following day the president of Emergency addressed a letter to the president of Garfield requesting "a full explanation of the circumstances under which this patient has been permitted to enter Garfield" (R. 658–659). A copy of the letter was sent to the District Society (R. 659). The secretary of the Society replied that the "important subject matter will be given prompt consideration" and referred the letter to the Hospital Committee (R. 660–661). Thereafter

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ileges by Georgetown (R. 628). He received somewhat similar treatment from Columbia (R. 630).

Dr. Halstead joined the Group Health staff in August 1938 (R. 709). He applied for privileges at five of the hospitals, including Georgetown, where he had interned (R. 709). No action was taken on his applications (R. 701).

Dr. Price applied for privileges at Homeopathic and Garfield in the spring of 1938 (R. 949). Homeopathic never granted him privileges and Garfield did not do so until December 19, 1938, the day before the indictment in this case was returned (R. 949, 1180).

Garfield, notwithstanding its well-established rule that any doctor may treat his patient there in an emergency case (R. 494, 1176–7), was careful to prevent Dr. Selders from using its facilities even in emergency cases.[35]

SUMMARY OF ARGUMENT

I

A. Petitioners conspired to boycott Group Health in order to prevent it from marketing medical services in competition with petitioners' doctor members. This Court has consistently held that such a boycotting combination to exclude a competitor from the market is a *restraint* of trade prohibited by the Sherman Act. These decisions have not been rested upon the ground that there had been price-fixing or that competition had been suppressed to the extent that market prices were substantially affected.

This Court did not hold in *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, that the restraints of trade condemned by the Sherman Act are limited to those involving price-fixing or a suppression of competition which substantially affects market prices. The case held only that the restraints prohibited by

[35] For the facts concerning Garfield's refusal to allow Dr. Selders to perform an emergency appendicitis operation, see R. 693–696, 753–754, 757; 762–763. Following this incident, Garfield, which had not previously defined "emergency," adopted a definition which specifically stated that it applied to Group Health (R. 1176–7).

the Act are those which suppress or substantially restrict competition in the marketing of goods or services and price-fixing was referred to merely as one conspicuous example of the type of restraint declared illegal. This interpretation of the *Apex* case is confirmed by *Fashion Originators' Guild, Inc.* v. *Federal Trade Commission*, 312 U. S. 457, which held that an intent to increase prices is not "an ever-present essential" of conduct constituting a violation of the Sherman Act.

B. The conspiracy to prevent Group Health from successfully carrying on its business of furnishing medical service to members of the consuming public was a restraint of *trade* prohibited by the Sherman Act. The act applies to restraints upon competition in providing services as well as goods and Congress cannot be presumed to have intended to exclude consumers of medical service from the protection extended generally to purchasers and consumers of goods or services.

Group Health was engaged in a large-scale undertaking to provide medical service in exchange for payment of dues. This exchange of service for money is trade in the primary and most usual meaning of the word. The fact that Group Health is a non-profit corporation is immaterial. Its business operations were trade, although carried on for the benefit of its consumer-members rather than for the benefit of stockholders.

Under the district court's charge to the jury, petitioners' convictions must be sustained if the

restraints upon the trade of Group Health are within the ban of the statute. But if the application of the Act to restraints upon individual doctors in the pursuit of their calling is an essential issue in this case, such restraints are within the scope of the common-law concept, embodied in the Sherman Act, of restraint of trade.

II

Section 20 of the Clayton Act grants immunity only where there is dispute concerning some question of employment involving the employer-employee relationship. Petitioners cannot subsume themselves under the class of employee representatives under the Act since petitioners' members were not employees and did not want to be employees. Rather, petitioners are analogous to a trade association representing independent business units. Nor was the controversy itself of a kind contemplated by the Clayton Act. The dispute between petitioners and Group Health was as to whether the latter's method of providing medical services should be permitted to operate. A controversy of this kind, between competitors and concerning competition, is not within the scope of Section 20. *Columbia River Packers Ass'n, Inc.* v. *Hinton*, 315 U. S. 143. A further factor establishing the inapplicability of the Clayton Act is that, even assuming that petitioners were "employee representatives," there was no employer-employee relationship in respect of Group Health

and its doctors. As the court below observed, the Group Health doctors are independent contractors, not employees; the relationship which was of concern to Congress in its enactment of the Clayton and Norris-LaGuardia Acts, therefore, is entirely lacking here.

ARGUMENT

I

THE ACTS FOR WHICH PETITIONERS WERE CONVICTED CONSTITUTE A CONSPIRACY IN "RESTRAINT OF TRADE" WITHIN THE MEANING OF SECTION 3 OF THE SHERMAN ACT

Petitioners were convicted of conspiring to prevent Group Health and the doctors on its staff from rendering or providing medical service to that portion of the general public represented by Government employees and their families, in competition with petitioners' doctor members. Petitioners contend that this is not a conspiracy in "restraint of trade" within the meaning of Section 3 of the Sherman Act. They contend that there was no showing that they conspired to fix prices or to suppress competition "to the extent that market prices are substantially affected to the injury of the public" and that therefore there is no "restraint" of trade within the prohibitions of Section 3. They urge also that their conspiracy restrained only the practice of medicine and the rendering of medical care and that restraint upon such activities is not

a restraint of "trade" within the meaning of Section 3.

It is our view that the issues thus presented cannot be resolved, as petitioners assume, by inquiring into the meaning of the single word "trade" and of the single word "restraint" divorced from their context in the phrase "restraint of trade." The question of statutory interpretation presented rather is the meaning of this phrase. "The common law doctrines relating to contracts and combinations in restraint of trade were well understood long before the enactment of the Sherman law," and Congress, in adopting the Sherman Act, found ready at hand "the common law concept of illegal restraints of trade" and "took over that concept." *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 497, 498.[38] The words of the phrase must, therefore, be construed as a unit and with reference to the common law concept from which it originated.

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[38] See also *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271 (C. C. A. 6), affirmed 175 U. S. 211, and *Standard Oil Co.* v. *United States*, 221 U. S. 1, 51, discussed in the *Apex* opinion, pp. 498–499.

The legislative history of the Act affirms this conclusion. In the debate on the bill Senator Hoar, a member of the Judiciary Committee, stated that the Judiciary Committee had, with reference to interstate and foreign commerce, "affirmed the old doctrine of the common law" (21 Cong. Rec. 3146). At a later point he declared: "The great thing that this bill does * * * is to extend the common-law principles" to such commerce (21 Cong. Rec. 3152). Senator Edmunds, chairman of the Judiciary Committee, explained that the intent was to define the offense in "terms that were well known to the law already" (21 Cong. Rec. 3148).

A. *Petitioners' Conspiracy to Exclude a Competitor from the Market, by Means of Boycott, is a Conspiracy in RESTRAINT of Trade Prohibited by Section 3*

Petitioners' contention (Br. 32–44) that there is not restraint of trade unless prices are fixed or competition is suppressed to the extent that market prices are substantially affected to the injury of the public is without support in, and wholly negatived by, the uniform course of holdings by this Court. It has long been firmly established that the Sherman Act prohibits as in restraint of trade a conspiracy by any dominant group engaged in offering goods or services to the general public to use the weapon of the boycott in order to exclude competitors from the market or to fix the conditions upon which competitors may enter the market.[37] In none of these decisions,

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[37] *Montague & Co.* v. *Lowry*, 193 U. S. 38; *Straus* v. *American Publishers' Ass'n*, 231 U. S. 222; *Eastern States Retail Lumber Dealers' Assn.* v. *United States*, 234 U. S. 600; *Binderup* v. *Pathe Exchange, Inc.*, 263 U. S. 291; *Paramount Famous Lasky Corp.* v. *United States*, 282 U. S. 30; *United States* v. *First National Pictures, Inc.*, 282 U. S. 44; *Sugar Institute, Inc.* v. *United States*, 297 U. S. 553, 587–589, 601; *Fashion Originators' Guild, Inc.* v. *Federal Trade Commission*, 312 U. S. 457.

Anderson v. *United States*, 171 U. S. 604, is sometimes cited as a contrary authority. That case held that an agreement by members of an exchange, composed of traders in livestock on a stockyards, not to deal with any nonmember trader did not violate the Sherman Act. The decision has subsequently been treated as resting on the holding that the facts did not

from *Montague* v. *Lowry*, decided in 1904, to the *Fashion Guild* case, decided last year, did the decision turn upon the ground that the boycotting group had fixed prices or had suppressed competition to the extent that market prices were substantially affected.[38] Indeed, except in *Straus* v. *American Publishers' Assn.*, which involved a boycott to enforce resale price maintenance, there was no evidence in these cases of price-fixing and none that competition had been suppressed to the extent claimed necessary by petitioners.

In the present case the conspiracy to prevent the successful operation of Group Health and to eliminate it as a competitor was entered into because petitioners believed that Group Health's method and plan of operation—providing medical care for persons of low income by means of group medical practice and the advance payment of uniform dues—threatened the economic interests of petitioners' doctor members. In several of the decisions condemning boycotts as unlawful restraints of trade the objective was similarly to prevent a form of competition deemed to be inimical

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disclose any restraint upon *interstate* commerce. *Montague & Co.* v. *Lowry*, *supra*, p. 48; *Loewe* v. *Lawlor*, 208 U. S. 274, 297; *Swift & Co.* v. *United States*, 196 U. S. 375, 397–398.

[38] While these decisions involve Section 1 of the Sherman Act, the prohibitions of Section 3, couched in the same language, are at least as broad in their scope as those of Section 1. *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U. S. 427, 434–435.

to the economic interests of the boycotting group.

For example, in *Eastern States Retail Lumber Dealers' Ass'n* v. *United States*, 234 U. S. 600, associations of retail dealers circulated among their members lists of wholesalers who sold direct to consumers, with the understanding that their members would refuse to deal with wholesalers thus listed. Sales direct from wholesaler to consumer by-passed the retailer and the retailers retaliated by combining to prevent the loss of business resulting from this form of competition, just as the present petitioners combined to prevent the loss of business which they feared would result from the operations of Group Health. And indeed, the boycott was even more complete and sweeping in the instant case since petitioners utilized not only their own members—whose positions paralleled the fellow-retailers in the *Lumber Dealers* case—but they forced third parties, the Washington hospitals, into the boycotting combination.

In this respect, the instant case closely resembles the situation condemned by this Court in *Fashion Originators' Guild, Inc.* v. *Federal Trade Commission*, 312 U. S. 457. In that case garment manufacturers who claimed to be creators of original designs agreed to boycott retail stores which sold clothes copied from their designs by other manufacturers. The Guild members, by this means, induced or coerced some 12,000 retail stores to "cooperate" in the boycott of copied garments. The Guild also employed "shoppers" to discover and

report whether stores were carrying copied garments and it established tribunals to determine whether particular garments were in fact copied from a Guild member's design.

The introduction of the retail stores into the boycotting combination is, we submit, in all respects analogous to the utilization of the Washington hospitals in the boycotting combination directed against Group Health. And the potential power of that combination fully equalled that of the combination of Guild members. While the "cooperating" retail stores numbered some 12,000, many remained outside the combination, while *all* of the non-Government Washington hospitals were induced to participate in the combination against Group Health. Moreover, the petitioners coerced this participation (*supra*, pp. 29–36), just as the Guild members used coercion to secure the cooperation of retail stores.

The policing methods employed in the present case to effectuate the combination are similarly analogous to the methods for policing their conspiracy used by Guild members. Petitioners, utilizing various "rules of conduct" embodied in or adopted under the District Society's constitution or AMA's Principles of Medical Ethics, established a "white list," investigated and brought to trial alleged infractions of these "rules," and probed into and exercised control over the affairs of the Washington hospitals—all for the purpose of

destroying the business and operations of Group Health.

This Court, in holding that the combination of Guild members was "well within the inhibitions of" the Sherman Act,[9] used words which, so far as the unlawful character of the restraint is concerned, apply with equal force to the present case (pp. 467–468):

> * * * the aim of petitioners' combination was the intentional destruction of one type of manufacture and sale which competed with Guild members. The purpose and object of this combination, its potential power, its tendency to monopoly, the coercion it could and did practice upon a rival method of competition, all brought it within the policy of the prohibition declared by the Sherman and Clayton Acts.

And this Court's statement in that case (pp. 465–466), that

> * * * the combination is in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce, and provides extra-

[9] The Federal Trade Commission, in a proceeding under the Trade Commission Act, had found that the practices of the Guild members, done in combination, constituted unfair methods of competition. This Court, in reviewing the Commission's order, held (p. 463) that practices which violate the Sherman Act may properly be found to be unfair methods of competition, and the Court therefore considered and passed upon the question whether the combination came within the condemnation of the Sherman Act.

> judicial tribunals for determination and punishment of violations, and thus "trenches upon the power of the national legislature and violates the statute." *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 242.

is (except that this case concerns trade only in the District of Columbia) of equal applicability here.

But without referring to these cases involving restriction of competition by boycotts, petitioners insist that *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, establishes that the Sherman Act prohibits only those restraints which involve price-fixing or suppression of competition to the extent that market prices are "substantially affected". But no such narrow and inflexible rule can be deduced from the wholly different situation with which this Court dealt in the *Apex* case.

The *Apex* case involved not a boycott by one competing group against another; but a strike by employees against an employer, which effectively brought a cessation of the employer's interstate business. This Court did not question the authority of the boycott cases but observed that they involved a "suppression of competition" (310 U. S. at p. 506) and were not, therefore, decisive. And indeed, the Court, in the *Apex* case explicitly referred to price-fixing as only one of the indicia of the type of restraints of trade which the Sherman Act condemns. Thus it said (pp. 500–501):

> Restraints on competition or on the course of trade in the merchandising of articles

> moving in interstate commerce is not enough, unless the restraint is shown to have or is intended to have an effect upon prices in the market *or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition.* * * * [Italics added.] [46]

The Court, therefore, held in the *Apex* case, that since the defendants there involved made no attack on competition in the market, and their purpose was not to suppress or restrict competition, but rather to attain some labor objective, their activities did not fall within the prohibitions of the Act. The Court specifically left untouched the boycott cases and, indeed, affirmed the doctrine of those cases that the range of proscribed restraints is not exhausted by price fixing and such suppression of competition as substantially fixes price. And this conclusion is reenforced by the *Fashion Guild* case, *supra,* decided subsequent to the *Apex* case. In the *Fashion Guild* case which, as we have noted, closely parallels the instant situation, the contention was made that the combination there involved could not violate the Serman Act since there was no finding that it fixed or regulated prices, limited production, or resulted in a deterioration of the quality of goods. The Court, in rejecting this contention, declared (p. 466) that "action falling into these three categories does not exhaust the types of conduct banned by the

[46] For other similar statements in the *Apex* case, see pp. 493, 497.

Sherman and Clayton Acts" and (p. 467) that "While a conspiracy to fix prices is illegal, an intent to increase prices is not an ever-present essential of conduct amounting to a violation" of those Acts.

In any event the very test of suppression or restriction of competition embodied in the *Apex* case is plainly met here. The purpose of the conspiracy in this case was to eliminate the competition of Group Health, and thereby to deprive purchasers and consumers—potential patients in need of medical care—of the advantages which accrue to them from free competition in the market. The suppression of competition by these means is plainly no less onerous than the suppression arising when market prices are manipulated or controlled.[9]

B. *Petitioners' Conspiracy to Restrain Group Health in Its Business of Providing Medical Care and Hospitalization Was in Restraint of TRADE Within the Meaning of Section 3*

If, as we submit, petitioners' activities constituted a "restraint" within the intendment of the

[9] While the words "marketing" and "market" are not customarily used with reference to medical service, the various physicians who, in a given locality, hold themselves out as ready to serve the public are, from the standpoint of restraint of trade or restraint of competition, in all respects analogous to the body of vendors who, in a particular locality, are engaged in offering goods for sale to the public. The market is the composite of all purveyors of goods or services, on the one hand, and of all potential purchasers or consumers thereof, on the other hand.

clause "restraint of trade" as used in the Sherman Act, we reach the second branch of the case, whether that which was restrained was "trade" within the meaning of the same clause.

Preliminarily, the exact nature of this second issue must be delimited; petitioners, we submit, have mistaken its scope. In examining whether "trade" was involved here, petitioners' main contention (Br. 29–31) rests upon the hypothesis that, for their conviction to be sustained, it must be established that the word "trade" encompasses an individual doctor's practice of his calling and that any restraint upon such practice is a restraint of trade within the meaning of the Act. But no such broad issue is tendered by this case. Rather, the "trade" which was here the object of restraint was *Group Health's business of providing medical care and hospitalization in return for the payment of money as dues.* The issue on this branch of the case, therefore, is whether the restraint of that business of Group Health was a restraint of *trade*.

That this is the issue appears plainly from the indictment and the district court's view of the case. The indictment charged a conspiracy to prevent Group Health from providing medical care by means of group practice on a risk-sharing prepayment basis. It alleged that AMA had been long opposed to practice on this basis (R. 7); that it had used its Journal to express publicly such opposi-

tion (R. 9); that it had used its Principles of Medical Ethics to condemn such practice as "unethical" (R. 10); and that after Group Health had been organized to furnish medical care on the basis opposed by petitioners they conspired to restrain it from succeeding in its endeavor (R. 14–15).

The indictment also charged that, as part of the conspiracy to destroy Group Health, petitioners combined to restrain the members of Group Health, the doctors on its staff, other doctors, and the Washington hospitals (R. 14–15). Petitioners assert (Br. 32) that the district court instructed the jury that restraint on the trade of any one of these five "classes" was sufficient to convict. On the basis of this interpretation of the instructions, they urge that if restraint on the activities of any one of the five is not a restraint of trade prohibited by Section 3, the judgments of conviction should be reversed,[42] and that, therefore, it is necessary to determine whether Section 3 applies to restraints

[42] Petitioners also contend (Br. 32) that their motions for judgment n. o. v., for a new trial, and in arrest of judgment, present the same issue, namely, whether the convictions can stand if restraint on any one of the five activities in question is not forbidden by Section 3. But these motions raised no such issue. They challenged convictions upon grounds not now material and upon the ground (1) that the entire evidence was insufficient to sustain conviction and (2) that the indictment failed to charge any offense under Section 3 (R 1517–24).

upon "the practice of medicine and the rendering of medical services" (Br. 81).[43]

Petitioners have, however, mistaken the district court's instructions to the jury. Under these instructions the jury, before convicting, was required to find that petitioners were engaged in a conspiracy to restrain the operations and business of Group Health. The district court advised the jury that the indictment alleged that petitioners conspired to restrain Group Health, the doctors on its staff, other doctors, and the Washington hospitals (R. 1507–8). But it further advised the jury that the indictment alleged that the "plan and purpose" of the conspiracy was to "hinder and ob-

[43] More precisely, petitioners insist (Br. 29–32) that each of the following five activities must be shown to be "trade": (1) Group Health's activities; (2) the activities of Group Health's members; (3) the activities of the medical staff of Group Health; (4) the practice of medicine generally; and (5) the activities of the Washington hospitals.

The district court made no mention of the allegation that petitioners conspired to restrain the *members* of Group Health (R. 1507–8) and thus it brought to the jury's attention restraint of four types of activity, not five. While we submit that the issue involves only the first activity—of Group Health—we show at a subsequent point (pp. 61–64) that in any event restraint of an individual in the practice of medicine is a restraint of trade. Our argument on that point covers both the third and fourth activities mentioned above. That the restraint of activities of the hospitals constituted restraint of trade is shown both by our argument relating to Group Health (*infra*, pp. 57–61) and by the argument concerning the broader issue whether restraint of the practice of medicine or rendering medical services is a restraint of trade.

struct" Group Health and the doctors on its staff, in certain specified ways (R. 1508). It then instructed the jury (*ibid.*):

> To sustain that charge the Government must prove beyond a reasonable doubt that a conspiracy did in fact exist to restrain trade in the District in at least one of the several ways alleged, *and according to the particular purpose and plan set forth.* * * * [Italics added.]

Under this instruction the jury, in order to convict, was required to find not only that there was a conspiracy to restrain trade in one of the several ways mentioned by the court (*i. e.*, to restrain Group Health, its doctors, other doctors, or the hospitals) but also that the plan and purpose of the conspiracy was to obstruct and interfere with Group Health in its business of providing medical care for its members. The jury was instructed, in other words, that restraint upon the business of Group Health was an essential element of the conspiracy charged against petitioners.

That this was the effect of the district court's instructions is further shown by the portion of its charge dealing with the opposing contentions of the parties. The court charged (R. 1509):

> The Government claims that the evidence proves the medical societies were opposed to Group Health and its plan of group medical care on a fixed prepayment basis; that they feared competition by that method of prac-

tice as against the fee-for-service method of organized physicians; that to obstruct and destroy such competition the medical societies, with certain officers and members of the hospitals, conspired to prevent successful operation of Group Health's plan by imposing restraints on physicians affiliated with Group Health * * *.

* * * * *

If you believe the contention of the Government is established beyond a reasonable doubt, then the conspiracy is made out * * *.

It also charged (R. 1510):

If it be true, as defendants claim, that the District Society, acting only to protect its organization, * * * adopted reasonable rules and measures to those ends, *not calculated to restrain Group Health, there would be no guilt* * * *." [Italics added.]

"The Court charged that there would be criminal intent if the defendants' purpose was to do acts the natural and probable effect of which would be to impose "any of the restraints alleged" (R. 1510). But if there was ambiguity in this language or in that quoted from R. 1508 (*supra*, p. 55), petitioners are not entitled to reversal by reason of such ambiguity since they did not take exception thereto and did not ask the court to clarify these portions of the charge. Only in exceptional circumstances will an appellate tribunal set aside the verdict of a jury for an error not brought to the attention of the trial court, for example, if the error is "obvious" or would "seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States v. Atkinson*, 297 U. S. 157, 160.

The court below adopted the Government's view as to the issue presented. It said that, "entirely apart from any direct restraint upon the practice of medicine itself," if a conspiracy was shown to restrain competition, raise prices, or otherwise control the market to the detriment of purchasers or consumers of medical or hospital services, "by destroying or injuring Group Health Association, it was sufficient to sustain conviction" (R. 1890).

In our view, therefore, the issue here is only whether restraint of the business of Group Health in supplying medical services and hospitalization is restraint of *trade*. We submit that there was such restraint.

In determining the range of activities which are protected against restraints prohibited by Sections 1 and 3 of the Sherman Act, Congress intended that the words of the Act be given a broad and liberal interpretation. *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U. S. 427, 434–435. The Act, as this Court noted in the *Apex* case (310 U. S. at pp. 493, 495), affords protection against restraints upon the marketing of both goods and services. The judicial history of the Sherman Act establishes the wide range of this protection, which extends to every commodity or service which is the subject of commerce, from railroad transportation (*United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61) through commodities such as petroleum and its products (*Standard Oil Co.* v. *United States*, 221 U. S. 1) to the service of dyeing or cleaning clothes

(*Atlantic Cleaners & Dyers, Inc.* v. *United States, supra*).

It can hardly be assumed that Congress intended to carve from this wide field of protected goods and services so basic and vital a service as the providing of medical care. For this, as we have noted, was precisely the business of Group Health. That organization had embarked upon a large-scale enterprise involving provision of medical service and hospitalization for some 2600 members and their dependents in return for the payment by these members of monthly dues.[45] In exchange for such payments, Group Health provided certain specified service. It was therefore engaged in a continuous course of dealing involving exchange of service for money and it was engaged in "trade" under the primary and most usual meaning of that word.

Petitioners contend (Br. 29) that since Group Health is a nonprofit organization its activities could not constitute "trade." But an organization may be engaged in trade although it does not carry on its operations for the purpose of earning a profit for itself or its stockholders.[46] Such an

[45] Potentially the enterprise might embrace the 100,000-odd Government employees in the District of Columbia and their families. Petitioners' appreciation of the potential scope of Group Health's operations was, indeed, one of the primary considerations actuating them in forming the conspiracy to combat Group Health (*supra*, pp. 20, 23).

[46] See *In the Matter of the Duty on the Estate of the Incorporated Council of Law Reporting for England and Wales*, 22 Q. B. 279, 293, per Lord Coleridge:

"* * * it is not essential to the carrying on of a trade that the person engaged in it should make, or desire to make,

organization may be engaged in "commerce" within the meaning of the commerce power of Congress. *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 128–129. There are many nonprofit consumers' cooperatives engaged in wholesaling or retailing. Plainly they are not the less engaged in trade, nor is a restraint upon their business operations the less a restraint of trade, simply because they return to their customers, in lower prices or in "patronage dividends", the equivalent of the ordinary dealer's profit. Nonprofit cooperative associations have been held to be "doing business" in a variety of situations.[*] If their nonprofit character does not exclude them from this phrase, it clearly does not exclude them from the broad phrase "restraint of trade."

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a profit by it. Though it may be true that in the great majority of cases the carrying-on of a trade does, in fact, include the idea of profit, yet the definition of the mere word 'trade' does not necessarily mean something by which a profit is made." * * *

[*] For purposes of taxation: *Md. & Va. Milk Producers Ass'n, Inc.* v. *District of Columbia*, 119 F. (2d) 787 (App. D. C.), certiorari denied 314 U. S. 646; *Hazen* v. *National Rifle Ass'n of America*, 101 F. (2d) 432, 440 (App. D. C.); *Sears, Roebuck & Co. Employees' Savings, Etc.* v. *Commissioner*, 45 F. (2d) 506, 509 (C. C. A. 7); *Memphis Chamber of Commerce* v. *Memphis*, 144 Tenn. 291, 296–297. Under a statute applicable to foreign corporations: *State* v. *Ku Klux Klan*, 117 Kans. 564, 572, 573; *Ku Klux Klan* v. *Commonwealth*, 138 Va. 500, 509; *Pacific Typesetting Co.* v. *International Typographical Union*, 125 Wash. 273, 277. Under a statute regulating corrupt political practices: *La Belle* v. *Hennepin County Bar Ass'n*, 206 Minn. 290, 294.

Petitioners also emphasize (Br. 17–20) this Court's references in the *Apex* case to the Sherman Act as prohibiting restraints of "business and commercial" transactions and restraints on "commercial" "business" competition; and they contend that restraints on competition in providing medical care and service cannot be regarded as within the Act since the competition is not "commercial" or "business." But, as we have noted, Group Health was engaged in business; the controversy between petitioners and Group Health, indeed, involved an effort by the former to destroy the business activities of the latter. Petitioners, representing one group of persons offering medical services, sought to eliminate the competition of another group with a different technique of offering such services. In any event, it is plain that this Court's use of the words "commercial" and "business" was only to underscore the distinction, there relevant, between restraints on the marketing of goods or services to purchasers or consumers and other kinds of restraints which merely impede commerce. For, as the Court observed (310 U. S. at pp. 486–487) a conspiracy to derail and rob an interstate train would not necessarily involve a violation of the Sherman Act. In such a case the essential element of "business" or "commercial" competition would probably be lacking, as it was in the *Apex* case; the Court utilized the words only in this sense, not in the sense of draw-

ing distinctions between one kind of calling and another.

Thus we submit that since Group Health's business was the object of petitioners' restraint and since that business was trade in its primary sense, there was a "restraint of trade" within the meaning of the Act. It is therefore unnecessary to determine whether the restraint of an *individual* doctor in the pursuit of his calling is as such a prohibited restraint of trade. But if we are wrong in our view of the issue we submit that restraint upon the individual doctor in the practice of his calling falls within the prohibitions of the Act [48] since restraint upon this type of activity was included in the common law doctrine of restraint of trade.

The common law concept of restraint of trade was, as we have noted (*supra*, p. 43), incorporated into the Sherman Act. See *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 498.[49] Concerning the scope

[48] Even the broader issue must, of course, be resolved with reference to the critical circumstances of the case—that the restraint upon the practice of individual doctors was entirely ancillary to, and for the purpose of, restraining the operations of an organization which, in substantial competition with petitioners' doctor members, had entered the field or market of providing medical care.

[49] In *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271 (C. C. A. 6) (affirmed 175 U. S. 211), which first judicially expounded the view that the Sherman Act was to be construed with reference to the common law doctrine of restraint of trade, the court said (p. 278), "it is certain that, if the contract of association which bound the defendants was void and unenforceable at the common law because in restraint of trade, it is within the inhibitions of the statute".

of the common law doctrine of restraint of trade, this Court said in *Standard Oil Co.* v. *United States*, 221 U. S. 1, 51:

> It is certain that at a very remote period the words "contract in restraint of trade" in England came to refer to some voluntary restraint put by contract by an individual on his right to carry on his *trade or calling.* * * * [Italics supplied.]

In England, from as early as 1793, a contract limiting a doctor in the pursuit of his calling has been consistently referred to as involving the doctrine of "restraint of trade."[50] Early American cases decided before the enactment of the Sherman Act recognized and followed the reasoning of the English cases.[51] In *Gilman* v. *Dwight*, 79 Mass. 356 (1849), the court, while holding that the contract limiting a doctor's practice was only in partial restraint of trade and therefore not unlawful, said (p. 359): "There is nothing in the nature of the business or profession [of a doctor], to which the contract relates, which takes it out of the ordinary rules applicable to contracts in partial restraint of trade." See also later American cases

[50] See *Davis* v. *Mason*, 5 T. R. 118 (1793); *Hayward* v. *Young*, 2 Chitty 407 (1818); *Atkyns* v. *Kinnier*, 4 Ex. 776 (1850); *Gravely* v. *Barnard*, L. R. 18 Eq. 518 (1874).

[51] See *Gilman* v. *Dwight*, 79 Mass. 356 (1859); *Dwight* v. *Hamilton*, 113 Mass. 175 (1873); *Cook* v. *Johnson*, 47 Conn. 175 (1879); *Haldeman* v. *Simonton*, 55 Iowa 144 (1880); *Manderville* v. *Harman*, 42 N. J. Eq. 185 (1886).

cited by the court below in *United States* v. *American Medical Ass'n,* 110 F. (2d) 703, 710.

The facts in *Pratt* v. *British Medical Ass'n,* [1919] 1 K. B. 244, are strikingly like those here.[52] This was a tort action to recover damages for a conspiracy to boycott the plaintiff doctors. They had joined the staff of an organization which had fallen under the ban of the defendant medical society because its members were opposed to what was called "contract practice." The plaintiffs were thereupon expelled from the society, and its members were, under the rules of the society, forbidden to consult with them. The court, in holding that the plaintiffs were entitled to recover, said (pp. 274–275):

> Upon considering the rules in question I have arrived at the conclusion that they are in restraint of trade, and are void on the ground of public policy. They gravely, and in my view unnecessarily, interfere with the freedom of medical men in the pursuit of their calling, and they are, I think, injurious to the interests of the community at large. It may well be that the opinion I have just expressed will, if upheld, destroy the cogency of the defendants' scheme of boycott; but it leaves them with the safer and more kindly weapons of legitimate persuasion and reasoned argument.

[52] The critical comments on the *Pratt* case in *Ware and De Freville, Ltd.* v. *Motor Trade Ass'n,* [1921] 3 K. B. 40, do not overrule or disapprove its basic doctrine.

In the present case the court below, in sustaining the validity of the indictment, carefully reviewed the authorities and concluded: [53]

> The indubitable effect of all of these cases, English and American, is to enlarge the common acceptation of the word "trade" when embraced in the phrase "restraint of trade" to cover all occupations in which men are engaged for a livelihood. * * *

The cases cited by petitioners (Br. 13–27) do not hold to the contrary. Most of these cases deal with the meaning of the word "trade" in a setting wholly foreign to the phrase "restraint of trade" as it is used in the Sherman Act.[54] Nor do the three cases—*Apex Hosiery Co.* v. *Leader*, 310 U. S. 469; *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U. S. 427; and *Federal Baseball Club* v. *National League*, 259 U. S. 200—which arise under the Sherman Act reach the issue here. The *Apex* case, as we have noted (*supra*, p. 60) referred to "business" or "commercial" competition or

[53] *United States* v. *American Medical Ass'n*, 110 F. (2d) 703, 710.

[54] In *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643, this Court was concerned with the question whether any competitor was shown to have been injured by the unfair trade practices of respondent, who sold an obesity remedy. Insofar as the Court referred to doctors at all, it held only that medical practitioners were not in competition with respondent; that they followed a "profession and not a trade, and are not engaged in the business of making or vending remedies but in prescribing them" (p. 653). Thus while the Court held doctors not to be *competing* with respondent, it stated that they were engaged in a *business*.

transactions in a context wholly unrelated to the question now presented. The *Atlantic Cleaners* case included (p. 436), in the course of its holding that restraint upon the service of cleaning and dyeing clothes was a restraint of trade forbidden by Section 3 of the Act, a quotation from *The Schooner Nymph*, 1 Summ. 516, 517–518, which stated that "Wherever any occupation, employment, or business is carried on for the purpose of profit, or gain, or a livelihood, not in the liberal arts or in the learned professions, it is constantly called a *trade*." That portion of this sentence upon which petitioners rely was plainly not pertinent to the question before the Court in the *Atlantic Cleaners* case, or before the court in *The Schooner Nymph* case. Similarly, the *Baseball Club* case is not decisive. It turned on the meaning of the word "commerce" as used in Sections 1 and 2 of the Act, and its holding that the restraint of baseball leagues was not a restraint of "trade or commerce" rested largely on the ground that there was no restraint of *interstate* commerce (pp. 208–209). That question, of course, is not present here.

II

PETITIONERS ARE NOT WITHIN ANY IMMUNITY CONFERRED BY SECTION 20 OF THE CLAYTON ACT

Section 20 of the Clayton Act provides that in any case "between an employer and employees" growing out of a dispute "concerning terms or con-

ditions of employment" certain specified conduct—strikes, peaceful picketing, peaceable assembly, ceasing to patronize—shall not "be considered or held to be violations of any law of the United States." The section is not limited to disputes between an employer and his immediate employees; it extends its protection to disputes (otherwise within the scope of the section) where the parties to the controversy do not stand in the proximate relation of employer and employee. *United States* v. *Hutcheson*, 312 U. S. 219.

Petitioners contend that Group Health engaged the services of doctors on a full-time, salaried basis; that it engaged the services of doctors who held membership in petitioners' organizations; that petitioners objected to these features of Group Health's plan of providing medical care; that the present case therefore grew out of a dispute concerning terms or conditions of employment; that this dispute was between an employer (Group Health) and employees (petitioners);[55] and that, accordingly, petitioners' conduct is rendered immune from prosecution by Section 20 of the Clayton Act.

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[55] Although petitioners were engaged in boycotting the doctors on Group Health's staff and were endeavoring to bring them into disrepute with their fellow doctors, under the contention now being considered petitioners cast themselves, as the court below said (R. 1894), "in the role of" organizations representing the interests of these boycotted doctors.

We submit that petitioners are clearly not within any immunity conferred by Section 20. It grants immunity only when there is a dispute concerning some question of employment involving the employer-employee relationship. Here there was no such dispute.

Three essential and related factors present here sharply distinguish the controversy between petitioners and Group Health from the kind of controversy which is immunized by the Clayton Act: first, the nature of petitioners and their members; second the nature of the controversy itself; and third, the nature of relationship of the doctors on the Group Health staff to Group Health. Any one of these elements precludes subsuming the instant situation under the class of labor disputes contemplated by the Act.

One element normally essential to a dispute protected by the Clayton Act is the presence on one side—the side the activities of which are immunized from prosecution—of employees, or their representatives, or both. This element is entirely lacking here. There were no employees, potential or otherwise, connected with petitioners. The doctor-members (other than the doctors serving Group Health, whose status is discussed below) whom petitioners represented were not employees of any employer; rather they were independent entrepreneurs who sell their services on a case-to-case basis. The doctor-members' income was received

from patients, and it can hardly be contended that an employer-employee relationship exists between the doctor-members and their patients. Each doctor member is, therefore, actually in business for himself, and each comprises an independent selling unit analogous to any other individual enterprise. Plainly, if all individual independent business men operating in a given field combined, their combination would be not a labor union, since they are not employees and do not wish to be employees, but rather a trade association. Just as an organization representing its members who catch and sell fish is not protected by the Clayton Act,[56] so petitioners, since not representing employees, are not protected here.

For similar reasons, the instant controversy was not a labor dispute within the meaning of the Clayton Act. Here petitioners sought to obstruct and defeat the operations of Group Health. The indictment charged and the evidence showed that the reason for forming this conspiracy was petitioners' fear of the competition of that organization and of the plan under which it offered medical service to members of the public. As the court below said, "The fact of commercial and business competition is the predominant note in the controversy which preceded the initiation of criminal prosecutions in this case" (R. 1890). The

[56] *Columbia River Packers Ass'n, Inc.* v. *Hinton*, 315 U. S. 143.

controversy out of which the present case arose was between petitioners, representing the body of organized doctors practicing on a fee-for-service basis, who desired to retain their existing monopoly of the business of furnishing medical care, and Group Health, an organization which challenged this monopoly by offering to provide medical care by means of group practice on a risk-sharing, prepayment basis. The situation is analogous to that which would exist if concerns engaged in marketing some commodity should combine to prevent a new competitor from intruding into their field of trade and should profess that the purpose of their combination was to protect the public against purchase of inferior goods.

The relationship between petitioners and Group Health was thus that of competitors, not that of employer and employee. Petitioners were not engaged in promoting, nor did they have any desire to promote, the interests of the employees of Group Health (assuming *arguendo* that the doctors on its staff are properly designated as employees). They were not seeking to procure for these doctors higher pay or more favorable working conditions. They were not seeking recognition as the collective-bargaining representative of Group Health doctors. They were not seeking jobs on Group Health's staff for their own members. On the contrary, as in *Columbia River Packers Ass'n, Inc.* v. *Hinton*, 315

U. S. 143, petitioners did not seek "employment" with Group Health and it was petitioners' desire that its members and other doctors "continue to operate as independent businessmen, free from such controls as an employer might exercise" (p. 147). Indeed, it was the very essence of petitioners' objective to destroy Group Health altogether so that it could not utilize the services of any doctors at all."[57]

We submit that the *Columbia River* case is decisive on this aspect of the case. The plaintiff there operated a fish cannery. The defendants were a union affiliated with the CIO, its members, and officers. The union acted as sales agent for its members in selling the fish caught by the members; in its sales contracts the union required the buyer to agree to purchase fish exclusively from union members. When the plaintiff cannery declined to make such an agreement, the union members refused to sell to it and it sought an injunction,

[57] It is in this respect, among others, that *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552, relied upon by petitioners (Br. 54–55) is inapposite. In that case, the objective of New Negro Alliance was the seeking of employment for those whom it represented. The groups which New Negro Alliance picketed and boycotted were, directly or indirectly, potential employers and the persons whose cause the Alliance espoused were their potential employees. In the instant case, the situation is exactly the contrary, for petitioners did not in any way seek "employment" for its members, but wished to end any possibility of such "employment."

charging a violation of the Sherman Act. This Court held that the jurisdictional limitations imposed by the Norris-LaGuardia Act were inapplicable because the case did not involve a labor dispute within the meaning of that act.[58] The Court said (pp. 145–147):

> That a dispute among businessmen over the terms of a contract for the sale of fish is something different from a "controversy concerning terms or conditions of employment, or concerning the association * * * of persons * * * seeking to arrange terms or conditions of employment" calls for no extended discussion. This definition and the stated public policy of the Act—aid to "the individual unorganized worker * * * commonly helpless * * * to obtain acceptable terms and conditions of employment" and protection of the worker "from the interference, restraint, or coercion of employers of labor"—make it clear that the attention of Congress was focussed upon disputes affecting the employer-employee relationship, and that the Act was not intended to have application to disputes over the sale of commodities.

[58] The holding and the reasoning of the Court obviously apply with even greater force to the narrower language used in Section 20 of the Clayton Act, namely, disputes "between an employer and employees * * * concerning terms or conditions of employment." Cf. *United States* v. *Hutcheson*, 312 U. S. 219.

> * * * the statutory classification, however broad, of parties and circumstances to which a "labor dispute" may relate does not expand the application of the Act to include controversies upon which the employer-employee relationship has no bearing. Our decisions in *New Negro Alliance* v. *Grocery Co.*, 303 U. S. 552, and *Milk Wagon Drivers' Union* v. *Lake Valley Co.*, 311 U. S. 91, give no support to the respondents' contrary contention, for in both cases the employer-employee relationship was the matrix of the controversy.

In addition, even assuming that petitioners and their members can be subsumed under the class of employee representatives and employees contemplated by the Clayton Act, the latter's protection is still inapplicable because of the relationship of Group Health to the doctors which comprise its staff. Here we assume, contrary to the actual situation, that petitioners can be regarded as trade unions representing their doctor members with reference to employment, and that petitioners also sought to "represent" the Group Health doctors. Nevertheless the relationship between Group Health and the doctors on its staff lacked the essential element of the kind of employer-employee relationship contemplated by the Clayton Act.

The Group Health doctors were not employees. As the court below observed (R. 1895)

"For a fixed sum they assumed to render services when needed. In the rendering of those services, when needed, they are not subject to supervision by the Association [Group Health]. Originally independent contractors, they do not lose that status by contracting to perform unsupervised services." It is unnecessary for this Court to decide whether doctors can ever be in such a position as to create an employee-employer relationship in respect of their medical services. Indeed, it may be that if doctors engaged on a contract basis in industrial medicine, or internes of a hospital working on a salary basis, formed a union for collective bargaining purposes, they would be protected by the Clayton Act. No such issue was presented here, however, since whatever characteristics of an employer-employee relationship may exist in other situations involving doctors, that relationship was absent in the instant case in respect of Group Health and the doctors who were on its staff.

We submit that on the basis of any one of these three factors—the nature of petitioners and their members, of the controversy here involved, and of the relationship between Group Health and its medical staff, the Clayton Act is inapplicable. It follows that these three elements combined patently remove the instant case from the operation of that Act.

CONCLUSION

It is respectfully submitted that the judgments of the court below should be affirmed.

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DECEMBER 1942.

U. S. GOVERNMENT PRINTING OFFICE: 1942

SUPREME COURT OF THE UNITED STATES.

Nos. 201-202.—October Term, 1942.

American Medical Association, a corporation, Petitioner,
201 *vs.*
The United States of America.

The Medical Society of the District of Columbia, a corporation, Petitioner,
202 *vs.*
The United States of America.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia.

[January 18, 1943.]

Mr. Justice Roberts delivered the opinion of the Court.

Petitioners have been indicted and convicted of conspiring to violate § 3 of the Sherman Act,[1] by restraining trade or commerce in the District of Columbia. They are respectively corporations of Illinois and of the District of Columbia. Joined with them as defendants were two unincorporated associations and twenty-one individuals, some of whom are officers or employes of one or other of the petitioners, the remainder being physicians practicing in the District of Columbia and members of the petitioners serving, as to some of them, on various committees of the petitioners having to do with professional ethics and with the practice of medicine by petitioners' members.

For the moment it is enough to say that the indictment charged a conspiracy to hinder and obstruct the operations of Group Health Association, Inc., a nonprofit corporation organized by Government employes to provide medical care and hospitalization on a risk-sharing prepayment basis. Group Health employed physicians on a full time salary basis and sought hospital facilities for the treatment of members and their families. This plan was contrary to the code of ethics of the petitioners. The indictment charges that, to prevent Group Health from carrying out its objects, the defendants conspired to coerce practicing physicians, members of the

[1] Act of July 2, 1890, § 3, c. 647, 26 Stat. 209, 15 U. S. C. § 3.

petitioners, from accepting employment under Group Health, to restrain practicing physicians, members of the petitioners, from consulting with Group Health's doctors who might desire to consult with them, and to restrain hospitals in and about the City of Washington from affording facilities for the care of patients of Group Health's physicians.

The District Court sustained a demurrer to the indictment on the grounds, amongst others, that neither the practice of medicine nor the business of Group Health is trade as the term is used in the Sherman Act.[2] On appeal the Court of Appeals reversed, holding that the restraint of trade prohibited by the statute may extend both to medical practice and to the operations of Group Health.[3]

The case then went to trial in the District Court. Certain defendants were acquitted by direction of the judge. As to the others, the case was submitted to the jury which found the petitioners guilty, and all the other defendants not guilty. From judgments of conviction the petitioners appealed to the Court of Appeals, which reiterated its ruling as to the applicability of § 3 of the Sherman Act, considered alleged trial errors, and affirmed the judgments.[4]

We granted certiorari limited to three questions which we thought important: 1. Whether the practice of medicine and the rendering of medical services as described in the indictment are "trade" under § 3 of the Sherman Act. 2. Whether the indictment charged or the evidence proved "restraints of trade" under § 3 of the Sherman Act. 3. Whether a dispute concerning terms and conditions of employment under the Clayton and Norris-LaGuardia Acts was involved, and, if so, whether petitioners were interested therein, and therefore immune from prosecution under the Sherman Act.

First. Much argument has been addressed to the question whether a physician's practice of his profession constitutes trade under § 3 of the Sherman Act. In the light of what we shall say with respect to the charge laid in the indictment, we need not consider or decide this question.

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[2] United States v. American Medical Association, 28 F. Supp. 752.

[3] United States v. American Medical Association, 72 App. D. C. 12, 110 F. 2d 703, 710, 711.

[4] American Medical Association v. United States, — App. D. C. —, 130 F. 2d 233.

Group Health is a membership corporation engaged in business or trade. Its corporate activity is the consummation of the cooperative effort of its members to obtain for themselves and their families medical service and hospitalization on a risk-sharing prepayment basis. The corporation collects its funds from members. With these funds physicians are employed and hospitalization procured on behalf of members and their dependents. The fact that it is cooperative, and procures service and facilities on behalf of its members only, does not remove its activities from the sphere of business.[5]

If, as we hold, the indictment charges a single conspiracy to restrain and obstruct this business it charges a conspiracy in restraint of trade or commerce within the statute. As the Court of Appeals properly remarked, the calling or occupation of the individual physicians charged as defendants is immaterial if the purpose and effect of their conspiracy was such obstruction and restraint of the business of Group Health. The court said:[6] "And, of course, the fact that defendants are physicians and medical organizations is of no significance, for Sec. 3 prohibits 'any person' from imposing the proscribed restraints . . ." It is urged that this was said before this court decided *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469. But nothing in that decision contradicts the proposition stated. Whether the conspiracy was aimed at restraining or destroying competition, or had as its purpose a restraint of the free availability of medical or hospital services in the market, the *Apex* case places it within the scope of the statute.[7]

Second. This brings us to consider whether the indictment charged, or the evidence proved, such a conspiracy in restraint of trade. The allegations of the indictment are lengthy and detailed. After naming and describing the defendants and the Washington hospitals, it devotes many paragraphs to a recital of the plan adopted by Group Health and alleges that, principally for economic reasons, and because of fear of business competition, the defendants have opposed such projects.

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[5] Compare, Associated Press v. National Labor Relations Board, 301 U. S. 103, 128-9; In re Duty on Estate of Incorporated Council, 22 Q. B. 279, 293; Maryland and Virginia Milk Producers' Ass'n v. District of Columbia, 119 F. 2d 787, 790; La Belle v. Hennepin County Bar Ass'n, 206 Minn. 290, 294, 288 N. W. 711.

[6] 119 F. 2d 711.

[7] Compare Fashion Originator's Guild v. Federal Trade Commission, 312 U. S. 457, 465, 466, 467.

The indictment then recites the size and importance of the petitioners, enumerates means by which they can prevent their members from serving Group Health plans, or consulting with physicians who work for Group Health, and can prevent hospitals from affording facilities to Group Health's doctors.

In charging the conspiracy, the indictment describes the organization and operation of Group Health and states that, from January 1937 to the date of the indictment, the defendants, the Washington hospitals, and others cognizant of the premised facts, "have combined and conspired together for the purpose of restraining trade in the District of Columbia, . . ." In five paragraphs the pleading states the purposes of the conspiracy. The first is the purpose of restraining Group Health from doing business; the second, that of restraining members of Group Health from obtaining adequate medical care according to Group Health's plan; the third, that of restraining doctors serving Group Health in the pursuit of their calling; the fourth, that of restraining doctors not on Group Health's staff from practicing in the District of Columbia in pursuance of their calling; and the fifth, that of restraining the Washington hospitals in the business of operating their hospitals.

After reciting certain of the proceedings and plans adopted to forward the conspiracy, the indictment alleges that the conspiracy, and the intended restraints which have resulted from it, have been effectuated "in the following manner and by the following means"; and alleges that the defendants have combined and conspired "with the plan and purpose to hinder and obstruct Group Health Association, Inc. in procuring and retaining on its medical staff qualified doctors and to hinder and obstruct the doctors serving on that staff from obtaining consultations with other doctors and specialists practicing in the District of Columbia." It states that, pursuant to this plan and purpose, the defendants have resorted to certain means to accomplish the end, and recounts them.

In another paragraph, the defendants are charged to have conspired with "the plan and purpose to hinder and obstruct Group Health Association, Inc. in obtaining access to hospital facilities for its members and to hinder and obstruct the doctors on the medical staff of Group Health from treating and operating on their patients in Washington hospitals." It is alleged that, pursuant to this plan and purpose, defendants have done certain acts to deter hos-

pitals with which they were connected and over which they exercised influence, from affording hospital facilities to Group Health's doctors.

The petitioners' contention is, in effect, that the indictment charges five separate conspiracies defined by their separate and recited purposes, namely, conspiracy to obstruct the business of Group Health, to obstruct its members from obtaining the benefit of its activities, to obstruct its doctors from serving it, to obstruct other doctors in the practice of their calling, and to restrain the business of Washington hospitals. The petitioners say that they were entitled to have the trial court rule upon the sufficiency in law of each of these charges and, as this was not done, the general verdict of guilty cannot stand. They urge that even though some of the named purposes relate to the business of Group Health, and that business be held trade within the meaning of the statute, yet, as the practice of medicine by doctors not employed by Group Health is not trade, and the operations of Washington hospitals are not trade, the last two purposes specified cannot constitute violations of § 3 and the jury should have been so instructed. In this view they insist that the jury may have convicted them of restraining physicians unconnected with Group Health, or of restraining hospitals, and, if so, the verdict and judgment cannot stand.

If in fact the indictment charges a single conspiracy to obstruct and restrain the business of Group Health, and if the recited purposes are really only subsidiary to that main purpose or aim, or merely different steps toward the accomplishment of that single end, and if the cause was submitted to the jury on this theory, these contentions fail.

When the case first went to the Court of Appeals that tribunal construed the indictment as charging but a single conspiracy. It said:[8] "The charge, stated in condensed form, is that the medical societies combined and conspired to prevent the successful operation of Group Health's plan, and the steps by which this was to be effectuated were as follows: (1) to impose restraints on physicians affiliated with Group Health by threat of expulsion or actual expulsion from the societies; (2) to deny them the essential professional contacts with other physicians; and (3) to use the coercive power of the societies to deprive them of hospital facilities for their patients."

[8] 110 F. 2d 711.

In the trial, the District Court conformed its rulings to this decision and submitted the case to the jury on the theory that the indictment charged but one conspiracy.

We think the courts below correctly construed the indictment. It is true that, in describing the conspiracy, five purposes are stated which the conspiracy was intended to further, but, in a later paragraph, still in the charging part of the instrument, it is alleged that the purpose was to hinder and obstruct Group Health in various ways and by various coercive measures, which are identical with the "purposes" before stated. The trial judge, after calling the jury's attention to the juxtaposition of these two formulations of the charge, added:

"These purposes, it is alleged, were to be attained by certain coercive measures against the hospitals and doctors designed to interfere with employment of doctors by Group Health and use of the hospitals by members of its medical staff and their patients. . . ."

In immediate context the judge added:

"To sustain that charge the Government must prove beyond a reasonable doubt that a conspiracy did in fact exist to restrain trade in the District in at least one of the several ways alleged, and according to the particular purpose and plan set forth."

At another point the trial judge summarized the Government's claim that the evidence in the case showed opposition by the petitioners to Group Health and its plan; that they feared competition between the plan and the organized physicians and that, to obstruct and destroy such competition, the petitioners conspired with certain officers and members and hospitals to prevent successful operation of Group Health's plan by imposing restraints upon physicians affiliated with Group Health, by denying such physicians professional contact and consultation with other physicians, and by coercing the hospitals to deny facilities for the treatment of their patients. Again the judge charged: "Was there a conspiracy to restrain trade in one or more of the ways alleged?" And again: "If it be true . . . that the District Society, acting only to protect its organization, regulate fair dealing among its members, and maintain and advance the standards of medical practice, adopted reasonable rules and measures to those ends, not calculated to restrain Group Health, there would be no guilt, though the indirect effect may have been to cause some restraint against Group Health."

We need add but a word as to the sufficiency of the proof to sustain the charge. The petitioners in effect challenge the sufficiency, in law, of the indictment. They hardly suggest that if the pleading charges an offense there was no substantial evidence of the commission of the offense. But, however the argument is viewed, we agree with the courts below that the case was one for submission to a jury. No purpose would be served by detailed discussion of the proofs.

Third. We hold that the dispute between petitioners and their members, and Group Health and its members, was not one concerning terms and conditions of employment within the Clayton[9] and the Norris-LaGuardia[10] acts.

Section 20 of the Clayton Act, as expanded by § 13 of the Norris-LaGuardia Act, is the only legislation which can have any bearing on the case. Section 20 applies to cases between "an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment . . ."; and provides that none of the acts specified in the section shall "be considered or held to be violations of any law of the United States."

Section 13 of the Norris-LaGuardia Act defines a labor dispute as including "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." It also provides that "A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or

[9] 38 Stat. 730, §§ 6 and 20, 15 U. S. C. 17, 29 U. S. C. 52.

[10] 47 Stat. 70, §§ 4, 5, 6, 8 and 13, 29 U. S. C. §§ 104, 105, 106, 108 and 113.

associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a 'labor dispute' (as defined in this section) of 'persons participating or interested' therein (as defined in this section)."

Citing these provisions the petitioners insist that their dispute with Group Health was as to terms and conditions of employment of the doctors employed by Group Health since the District Medical Society objected to its members, or other doctors, taking employment under Group Health on the terms offered by that corporation. They assert that § 20 of the Clayton Act, as expanded by § 13 of the Norris-LaGuardia Act, includes all persons and associations involved in a dispute over terms and conditions of employment who are engaged in the same industry, trade, craft, or occupation, or have direct or indirect interests therein. And they rely upon our decisions in *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552, and *Drivers Union* v. *Lake Valley Co.*, 311 U. S. 91, as bringing within the coverage of the acts a third party, even though that party be a corporation not in trade, and employers and employers' associations even though they be only indirectly interested in the controversy. They insist that as the petitioners and Group Health, its members and doctors, other doctors and the hospitals, were either directly or indirectly interested in a controversy which concerned the terms of employment of doctors by Group Health, the case falls within the exemption of the statutes and they cannot be held criminally liable for a violation of the Sherman Act.

It seems plain enough that the Clayton and Norris-LaGuardia Acts were not intended to immunize such a dispute as is presented in this case. Nevertheless, it is not our province to define the purpose of Congress apart from what it has said in its enactments, and, if the petitioners' activities fall within the classes defined by the acts, we are bound to accord petitioners, especially in a criminal case, the benefit of the legislative provisions.

We think, however, that, upon analysis, it appears that petitioners' activities are not within the exemptions granted by the statutes. Although the Government asserts the contrary, we shall assume that the doctors having contracts with Group Health were employes of that corporation. The petitioners did not represent present or prospective employes. Their purpose was to prevent

anyone from taking employment under Group Health. They were interested in the terms and conditions of the employment only in the sense that they desired wholly to prevent Group Health from functioning by having any employes. Their objection was to its method of doing business. Obviously there was no dispute between Group Health and the doctors it employed or might employ in which petitioners were either directly or indirectly interested.

In truth, the petitioners represented physicians who desired that they and all others should practice independently on a fee for service basis where whatever arrangement for payment each had was a matter that lay between him and his patient in each individual case of service or treatment. The petitioners were not an association of employes in any proper sense of the term. They were an association of individual practitioners each exercising his calling as an independent unit. These independent physicians, and the two petitioning associations which represent them, were interested solely in preventing the operation of a business conducted in corporate form by Group Health. In this aspect the case is very like *Columbia River Packers Association, Inc.*, v. *Hinton*, 315 U. S. 143. What was there decided requires a holding that the petitioners' activities were not exempted by the Clayton and the Norris-LaGuardia Acts from the operation of the Sherman Act.

The judgments are affirmed.

Mr. Justice MURPHY and Mr. Justice JACKSON took no part in the consideration or the decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.